Tee Yam @ Koo Tee Yam v Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors

HIGH COURT (MUAR) — PERMOHONAN JENAYAH NO 44–14 OF 2005
JEFFREY TAN J
7 JULY 2005

Criminal Procedure — Habeas corpus — Emergency (Public Order and Prevention of Crime) Ordinance 1969, detention under — Whether there were errors fatal to detention order — Whether arresting officer had reason to believe that there were grounds which would justify detention — Whether applicant had access to counsel whilst he was under police detention — Whether applicant's rights was violated by presence of police officers at meetings between applicant/counsel — Whether applicant has an automatic right to particulars as and when demanded — Whether Advisory Board had discharged its statutory duty in accordance with procedural requirements — Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 4, 4 (1), 5(2)(b)(iii) & 6 — Internal Security (Detained Persons) Rules 1960 r 81(5) — Federal Constitution art 5

This was an application filed for a writ of *habeas corpus*, to set at liberty the applicant who was presently detained under an order and made pursuant to s4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('EO 1969'). The applicant was arrested pursuant to s 3(1) of the EO 1969. The police detained the applicant for 60 days. Thereafter, the Minister directed the applicant to be detained for a period of two years. The applicant made representation to the Advisory Board ('AB'). The AB heard the representation for eight full days. By letter, it was conveyed to the applicant that the Yang di-Pertuan Agong had affirmed the order of detention.

Held, dismissing the application:

(1) It was for the detaining authority to prove the legality of the detention. Once that was proved it was then for the applicant to show that the power had been exercised *mala fide* or improperly or made for a 'collateral' or 'ulterior' purpose. The court would not inquire into the sufficiency, relevancy or otherwise of the allegations of fact. Whether or not the facts on which the order of detention was to be based were sufficient or relevant was a matter to be decided solely by the Minister. The subjective satisfaction of the minister was not subject to judicial review (see para 15); *Patto a/l Perumal v Menteri Hal Ehwal Dalam Negeri & Anor* [1989] 1 MLJ 255 followed.

(2) The EO 1969 provides for police detention of up to 60 days, and detention by the order of the Minister for a period not exceeding two years, which latter detention may be extended, suspended or revoked. Under s 3(1) of the EO 1969, the requirement was that the arresting officer 'has reason to believe that there are grounds which would justify his detention under

section 4(1)'. In the absence of all information, there could and would not be any reason to believe that there are grounds which would justify detention under section 4(1). An arrest without information in hand would be arrest without 'reason to believe', and would be unlawful. In the instant case, it could not be said that the applicant was arrested without information in hand. In the first place, it was conceded that three or four witness statements were recorded about one or two months before arrest of the applicant. Furthermore, it was averred by the arresting officer that given the information received on the applicant he had reason to believe that were grounds to justify detention under s 4(1). Given so, itcould not be true that the case against the applicant was entirely built up during the 60 days police detention (see para 39).

(3) In essence, the reason for the arrest was that the arresting officer had reason to believe that there were grounds which would justify detention under s 4(1). And reasonably, that averred explanation in simple Malay by the arresting officer and then in Mandarin, which was more than merely telling the applicant that he was arrested under some section of some enactment, should have conveyed the reason for arrest to the applicant, and should have been sufficient to enable the applicant to understand why he had been arrested. The denial by the applicant was not any material or sufficient material for to find a breach of the first limb of art 5(3) of the Federal Constitution (see para 40).

(4) The applicant had access to counsel whilst he was under police detention. Furthermore, the applicant had the services of counsel for the length and duration of the eight days hearing before the AB (see para 43).

(5) It would not appear that the presence of police officers at meetings between applicant/counsel had violated the rights of the applicant. The proviso to s 4 of the EO 1969 provides that 'the Internal Security (Detained Persons) Rules 1960 ('1960 Rules') shall apply to every place of detention and to all persons detained therein under (the EO 1969)'. Rule 81(5) of those 1960 Rules provides that a Superintendent or an officer, or in the case of a visit to a female, a wardress, shall together with an interpreter in any case where such officer does not understand the language spoken be in sight and hearing during the whole of any visit to a detained person, unless the Superintendent by an order in writing sees fit to dispense with any of the above requirements'. And r 81(5) should apply, but of course, *mutadis muntadis* to the EO 1969. Sanctioned by law, the presence of police officers at meetings between detainee/counsel could not be cause for complaint (see para 44).

(6) There was no automatic right to particulars as and when demanded. The right to particulars is subordinate to the opinion of the Minister. Under s 5(2)(b)(iii) of the EO 1969, the Minister had the right not to

furnish particulars, if such particulars were in the opinion of the Minister not reasonably required in order to make the representation to the AB. In the instant case, the grounds on which the order was made and the allegations of fact, were both furnished. The particulars were disclosed in the allegations of fact and those particulars in the allegations of fact would have been the particulars that the Minister in his opinion considered that the applicant might require in order to make his representation. Furthermore, under r 10(2)(c) of the Public Order and Prevention of Crime (Procedure) Rules 1972, the AB had the discretion to determine 'whether any document or other information should or should not be made available or disclosed to a detained person and his advocate, or either of them'. The applicant could not demand particulars from the AB. There is no jurisdiction to review the opinion of the Minister under s 5(2)(b)(iii) and or the discretion of the AB under the aforesaid rule 10(2)(c). There was compliance with s 5. The Minister could not have been ordered by the AB to furnish particulars, as s 11 of the EO 1969 provides that 'nothing in the Ordinance or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or produce documents which he considers it to be against national interest to disclose or produce', which provision applies to proceedings before the AB (see para 48).

(7) The AB had discharged its statutory duty under s 6 of the EO 1969 in accordance with procedural requirements. Given so, there was nothing more that the applicant could demand of the AB. The applicant could seek a review under s 7 of the EO 1969 from the AB, but not a reversal of the recommendation. Right or wrong, the recommendation itself is beyond judicial examination (see para 48).

(8) There was no defect in the procedure adopted by the detaining authority. And it was not shown that there was any collateral or ulterior purpose on the part of the detaining authority. Rather, it was shown that the arresting officer had 'reason to believe', and that his 'reason to believe' was with objective basis. It was also shown that all allegations of fact relate either to acts prejudicial to public order, or to acts involving violence, in either case to acts within the scope of the EO 1969. All that pointed to the *bona fide* use of the EO 1969 (see para 54).

[**Bahasa Malaysia summary**

Ini merupakan permohonan untuk satu writ *habeas corpus*, untuk membebaskan pemohon yang sekarang ini ditahan di bawah satu perintah yang dibuat di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 ('EO 1969'). Pemohon ditahan di bawah seksyen 3(1) EO 1969. Polis menahan pemohon selama 60 hari. Kemudian dari itu, Menteri mengarahkan agar pemohon

ditahan untuk tempoh masa selama 2 tahun. Pemohon telah membuat representasi ke Lembaga Penasihat ('LP'). LP mendengar representasi tersebut selama lapan hari penuh. Melalui surat, ia memberitahu kepada pemohon bahawa Yang di-Pertuan Agong telah mengesahkan perintah penahanan tersebut.

Diputuskan, menolak permohonan itu:

(1) Ianya adalah pada pihak berkuasa yang menahan untuk membuktikan keesahan penahanan tersebut. Apabila ia telah dibuktikan, maka pemohon pula hendaklah menunjukkan yang bahawa kuasa tersebut telah diguna pakai secara *mala fide* atau tidak wajar atau telah dibuat untuk tujuan 'cagaran' atau 'tersembunyi'. Mahkamah tidak akan memeriksa sama ada fakta yang didakwa mencukupi atau relevan. Sama ada fakta-fakta yang didasarkan bagi membuat perintah penahanan mencukupi atau relevan diputuskan secara mutlak oleh Menteri. Kepuasan subjektif menteri tidak tertakluk kepada kajian semula kehakiman (lihat perenggan 15); *Patto a/l Perumal v Menteri Hal Ehwal Dalam Negeri & Anor* [1989] 1 MLJ 255 diikut.

(2) EO 1969 memperuntukkan penahanan polis selama 60 hari, dan penahanan di bawah perintah Menteri untuk jangka masa tidak melebihi dua tahun, yang mana yang kemudian itu boleh dilanjutkan, digantung atau dibatalkan. Di bawah seksyen 3(1) EO 1969, keperluan adalah untuk pegawai yang menahan 'mempunyai sebab untuk dipercayai bahawa terdapat alasan-alasan yang boleh menjustifikasikan penahanan di bawah s 4(1)'. Dalam ketiadaan kesemua maklumat ini, maka tiada sebarang sebab untuk dipercayai bahawa terdapat alasan-alasan yang boleh menjustifikasikan penahanan di bawah s 4(1). Satu penahanan tanpa maklumat tersedia adalah satu penahanan tanpa 'sebab untuk dipercayai', dan ianya menyalahi undang-undang. Di dalam kes semasa, ianya tidak boleh dikatakan bahawa pemohon ditahan tanpa maklumat tersedia. Pada mula-mulanya, ianya diakui bahawa terdapat tiga atau empat pernyataan saksi-saksi yang direkodkan satu atau dua bulan sebelum penahanan pemohon. Selanjutnya, ianya dikatakan oleh pegawai penahan, bahawa oleh kerana maklumat yang diterima berkenaan pemohon, beliau mempunyai sebab untuk dipercayai bahawa terdapat alasan-alasan untuk memberikan justifikasi penahanan di bawah s 4(1). Dari itu, ianya tidak benar yang kes terhadap pemohon dibina semasa 60 penahanan polis (lihat perenggan 39).

(3) Pada intipati, alasan untuk penahanan adalah kerana pegawai yang menahan mempunyai sebab untuk dipercayai bahawa terdapat alasan-alasan yang boleh memberi justifikasi penahanan di bawah s 4(1). Dan sewajarnya, penjelasan dinyatakan di dalam bahasa Melayu yang ringkas oleh pegawai yang menahan dan kemudiannya di dalam bahasa mandarin, yang mana ianya lebih dari memberitahu pemohon bahawa beliau telah ditahan di bawah satu seksyen sesuatu enakmen, sepatutnya sebab penahanan

diberitahu kepada pemohon, dan sepatutnya ianya mencukupi bagi pemohon untuk memahami mengapa beliau ditahan. Penafian dari pemohon bukan satu yang material atau cukup material untuk mendapati satu pengingkaran bahagian pertama art 5(3) Perlembagaan Persekutuan (lihat perenggan 40).

(4) Pemohon mempunyai akses kepada peguamcara semasa beliau di bawah tahanan polis. Selanjutnya, pemohon juga mendapat perkhidmatan peguamcara di sepanjang tempoh lapan hari dan lapan pendengaran dihadapan LP (lihat perenggan 43).

(5) Ianya tidak tampak yang kehadiran pegawai polis semasa perjumpaan diantara pemohon dan peguamcaranya telah mencabuli hak-hak pemohon. Proviso kepada s 4 EO 1969 memperuntukkan bahawa 'Kaedah-kaedah Keselamatan Dalam Negeri (Orang Tahanan) 1960 ('Kaedah 1960') terpakai kepada kesemua tempat tahanan dan kepada semua tahanan yang ditahan di bawah (EO 1969)'. Kaedah 81(5) Kaedah 1960 memperuntukkan bahawa seorang Superintenden atau pegawai, atau dalam kes lawatan kepada tahanan perempuan, seorang penjaga perempuan, bersama dengan seorang juru bahasa jika pegawai tersebut tidak faham bahasa yang digunakan berada di tempat yang boleh tampak dan didengar semasa lawatan ke atas orang tahanan, melainkan jika Superintenden dengan perintah bertulis merasakan wajar untuk mengabaikan keperluan tersebut'. Dan k 81(5) terpakai, *mutadis muntadis* dengan EO 1969. Sebagaimana yang diperuntukkan di bawah undang-undang, kehadiran pegawai polis semasa perjumpaan di antara orang tahanan dan peguamcara tidak boleh menjadi sebab untuk merungut (lihat perenggan 44).

(6) Tiada hak automatik kepada butir-butir seperti dan apabila dituntut. Hak untuk butir-butir adalah tertakluk kepada pendapat Menteri. Dibawah s 5(2)(b)(iii) EO 1969, Menteri mempunyai hak untuk tidak memberikan butir-butir, jika butir-butir tersebut pada pandangan Menteri tidak begitu perlu bagi membuat representasi ke LP. Di dalam kes semasa, alasan-alasan pada mana perintah tersebut dibuat dan dakwaan fakta diberikan. Butir-butir tersebut didedahkan di dalam dakwaan fakta dan butir-butir tersebut itulah yang menjadi butir-butir yang pada pandangan Menteri mungkin diperlukan oleh pemohon untuk beliau membuat representasi. Tambahan lagi, di bawah k 10(2)(c) Kaedah-Kaedah Ketenteraman Awam dan Pencegahan Jenayah 1972, LP mempunyai budibicara untuk memutuskan 'sama ada sebarang dokumen atau maklumat lain patut atau tidak diberikan kepada orang tahanan dan peguamcaranya, atau salah seorang dari mereka'. Pemohon tidak boleh menuntut butir-butir dari LP. Tiada bidangkuasa untuk mengkaji semula pendapat Menteri di bawah s 5(2)(b)(iii) dan LP tidak mempunyai budibicara di bawah k 10(2)(c). Seksyen 5 dipatuhi. Menteri tidak boleh diperintahkan oleh LP untuk memberikan butir-butir tersebut, kerana seksyen 11 EO

1969 memperuntukan bahawa "tiada apa di bawah Ordinan tersebut atau mana-mana undang-undang yang dibuat di bawahnya yang menghendaki Menteri atau mana-mana ahli Lembaga Penasihat atau mana-mana sebarang pekerja kerajaan untuk mendedahkan fakta-fakta atau mengemukakan dokumen yang mana beliau anggap bertentangan dengan kepentingan Negara untuk didedahkan atau di kemukakan', yang mana peruntukan ini terpakai kepada prosiding di hadapan LP (lihat perenggan 48).

(7) LP telah menjalankan tugas berkanunnya di bawah s 6 EO 1969 mengikut keperluan prosedurnya. Oleh itu, tiada apa lagi yang boleh dituntut oleh pemohon dari LP. Pemohon boleh memohon kajian semula di bawah s 7 EO 1969 dari LP, tetapi bukan kebalikan perakuan. Betul atau salah, perakuan itu di luar pemeriksaan kehakiman (lihat perenggan 48).

(8) Tidak terdapat kecacatan di dalam prosedur yang diguna pakai oleh pihak berkuasa yang penahan. Dan ianya tidak ditunjukkan yang bahawa terdapat sebarang cagaran atau tujuan tersembunyi pada pihak berkuasa yang menahan. Sebaliknya, ianya ditunjukkan bahawa pegawai yang menahan mempunyai 'sebab untuk dipercayai', dan 'sebab untuk dipercayainya berasas objektif. Ianya juga ditunjukkan yang bahawa kesemua dakwaan-dakwaan fakta berhubung sama ada kepada perbuatan-perbuatan yang memprejudiskan keamanan awam, atau perbuatan-perbuatan yang melibatkan keganasan, di dalam mana-mana kes, perbuatan-perbuatan tersebut adalah di bawah skop EO 1969. Kesemua ini menunjukkan yang EO 1969 telah digunakan secara *bona fide* (lihat perenggan 54).]

Notes

For a case on detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1938.

Cases referred to

Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92 (refd)
Athappen a/l Arumugam v Menteri Hal Ehwal Dalam Negeri. Malaysia & Ors [1984] 1 MLJ 67 (refd)
Chan Ng v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1995] MLJU 419 (refd)
Che Su bte Shafie v Superintendent of Prisons, Pulau Jerejak, Penang [1974] 2 MLJ 194 (refd)
Chong Kim Lau v Timbalan Menteri Dalam Negeri Malaysia & Anor [1989] 3 MLJ 121 (refd)
Chong Yung Yao v Menteri Keselamatan Dalam Negeri Malaysia & Ors [2005] 5 CLJ 461 (refd)
Dato' James Wong Kim Min, Re [1976] 2 MLJ 245 (refd)

A *Edwards et al v Law Society of Upper Canada* 37 OR (3d) 279 (refd)
Fray v Balckburn (1863) 3 B & S 576 (refd)
Gurcharan Singh a/l Bachittar Singh v Penguasa Tempat Tahanan Perlindungan Kamunting Taiping [1997] 4 MLJ 123 (refd)
Henry a/l Arumanathan v Timbalan Menteri Dalam Negeri & Ors [1995] 1 CLJ 683 (refd)
B *Jamaluddin bin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 1 MLJ 368 (refd)
Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors [2003] 1 MLJ 32 (refd)
Kandupillai a/l Krishnan v Timbalan Menteri Dalam Negeri Malaysia & Ors [2004] 1 MLJ 85 (refd)
C *Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129 (refd)
Keraiaan Malaysia & Ors v Nasharuddin Nasir [2004] 1 CLJ 81 (refd)
Ketua Polis Negara & Anor v Gan Bee Huat and other appeals [1998] 3 MLJ 86 (refd)
Khawaja v Secretary of State for the Home Department [1983] 1 All ER 765 (refd)
Koh Yoke Koon [1988] 1 MLJ 45 (refd)
D *Lee Gee Lam v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1993] 3 MLJ 265 (refd)
Lee Kew Sang v Timbalan Menteri [2005] 2 MLJ 631 (refd)
Lee Mau Seng v Minister for Home Affairs, Singapore & Anor [1971] 2 MLJ 137 (refd)
Lippe et autres v Quebec (Procureur general) et autres 39 QAC 241 (refd)
E *Liversidae v Sir John Anderson & Anor* [1942] AC 206 (refd)
Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor [1993] 3 MLJ 691 (refd)
Low Soon Mooi v Menteri Hal Ehwal Dalam Negeri & Anor [1989] 2 MLJ 350 (refd)
Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor v Mohd Zambri [1990] 1 MLJ 102 (refd)
Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Chua Teck [1990] 1 MLJ 104 (refd)
F *Minister for Home Affairs, Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29 (refd)
Minister for Home Affairs, Malaysia & Anor v Jamaluddin bin Othman [1989] 1 MLJ 418
Mohamad Ezam bin Mohd Nor & Ors v Menteri Dalam Negeri & Anor [2003] 2 MLJ 364 (refd)
Mohd Ali bin Mohd Radi v Director of Prison, Rehabilitation Centre, Pulau Jerejak, Pulau Pinang & Anor and other appeals [1989] 1 MLJ 248 (refd)
G *Mok Han Liang v Timbalan Menteri Dalam Neaeri Malaysia & Ors* [1996] 5 MLJ 74 (refd)
Mourat Mehmet, Re [1962] 1 All ER 463 (refd)
Muhamad Ali bin Hamid, Re [1999] 2 MLJ 703 (refd)
H *Musa bin Salleh v PP* [1973] 1 MLJ 167 (refd)
Nadarajan v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications [1994] 2 MLJ 657 (refd)
Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 3 MLJ 285 (refd)
Ong Yew Teck, Re [1960] 1 MLJ 67 (refd)
I *Onkar Shrian, Re* [1970] 1 MLJ 29 (refd)
Ooi Ah Phuav Officer-in-Charge, Criminal Investigations, Kedah, Perlis [1975] 2 MLJ 198 (refd)

Patto a/l Perumal v Menteri Hal Ehwal Dalam Negeri & Anor [1989] 1 MLJ 255 (folld)
PE Long v Menteri Hal Ehwal Dalam Neaeri Malaysia [1976] 2 MLJ 133 (refd)
PP v Dato' Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
PP v Khong Teng Khen [1976] 2 MLJ 166 (refd)
PP v Lau Kee Hoo [1983] 1 MLJ 157 (refd)
PP v Yee Kim Seng [1983] 1 MLJ 252 (refd)
Prefontaine v Gosman 9903–11629 Alta QB 2000 Alta DJ 206; 2000 Alta DJ LEXIS 257 (refd)
Puvaneswaran v Menteri Hal Ehwal Dalam Negeri. Malaysia & Anor [1991] 3 MLJ 28 (refd)
Ram Bahadur Rai v State of Bihar 1975 Cri LJ 269 (refd)
Rover v Mignault (1988) 50 DLR (refd)
Saranavan a/l KS Somu v Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 1 MLJ 399 (refd)
Sinnasamy a/l Subbiah v Timbalan Menteri Dalam Negeri Malaysia & Ors [2004] 1 MLJ 378 (refd)
Sirros v Moore [1975] 1 QB 118 (refd)
Soo Kua v PP [1970] 1 MLJ 91 (refd)
State (Trimbole) v The Governor of Mountjoy Prison [1985] IR 550 (refd)
Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors [1977] 1 MLJ 82 (refd)
Sukumar a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors [2000] MLJ 305 (refd)
Sundar Singh v Emperor 1930 AIR Lah 945 (refd)
Superintendent of Pulau Jerelak & Anor v Wong Cheng Ho [1980] 1 MLJ 154 (refd)
Tan Boon Liat, Re [1977] 2 MLJ 108 (refd)
Tan Sri Raja Khalid bin Raja Harun, Re; Inspector General of Police v Tan Sri Rala Khalid bin Raja Harun [1984] 1 MLJ 182 (refd)
Tan Sri Raja Khalid, Re; Ketua Polis Negara v Abdul Ghani Haroon [2001] 4 MLJ 11 (refd)
Teh Hock Seng v Minister of Home Affairs & Anor [1990] 3 MLJ 191 (refd)
Theresa Lim Chin Chin & Ors v IGP [1988] 1 MLJ 293 (refd)
Tuang Pik King v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1989] 1 MLJ 301 (refd)
Wong Chee Kong v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [2000] 5 MLJ 228 (refd)
Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors [1988] 2 CLJ 274 (refd)
Wong Kiew Meow lwn Timbalan Menteri Dalam Negeri,. Malaysia dan satu lain [1994] 1 MLJ 714 (refd)
Yeap Hock Seng v Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 10
Criminal Law (Temporary Provisions) Ordinance 1955 s 55(1)
Dangerous Drugs (Special Preventive Measures Act) 1985
Courts of Judicature Act 1964 s 14
Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(1), (2), (3), 4(1), 5(2)(b), 7C, 11

A Public Order and Prevention of Crime (Procedure) Rules 1972 r 10(2)(c)
Internal Security Act 1960 ss 8, 12, 16, 73, (1)(b)
Internal Security (Detained Persons) Rules 1960 s 4, 81(5)
Federal Constitution art 5(1), (2), (3), 9, 10, 13, 149(1), 150, (2)(c), 151

B *Muhammad Shafee Abdullah (Lillian Lee Lin Lin, Kaushalya Rajathurai and Frida Krishnan with him) (Shafee & Co) for the applicant.*
Mohd Yusof bin Hj Zainal Abiden (Tun Abd Majid bin Tun Hamzah, Kamaluddin bin Mohd Said, Najib bin Zakaria with him) (Attorney-General's Chambers) for the respondents.

C **Jeffrey Tan J**:

[1] This is an application filed on 4 February 2005 for a writ of *habeas corpus*, to set at liberty the applicant who is presently detained under an order dated 24 May 2004 and made pursuant to s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('EO 1969') which reads:

D

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order directing that that person be detained for any period not exceeding two years.

E

[2] The detention order, the allegations of fact on which the detention order was based, and the notice of right to make representation against the detention order to the advisory board, are now reproduced below:

F

ORDINAN DARURAT

(Ketenteraman Awam dan Mencegah Jenayah) 1969 Perintah Tahanan [Seksyen 4(1)]

Kepada:

G

Pegawai Yang Menjaga Pusat Pemulihan Akhlak,
Simpang Rengam Johor,
Ketua Polis Negara Malaysia;
Semua Pegawai Polis Diraja Malaysia yang berkenaan

Bahawasanya saya, berpuashati yang perintah tahanan adalah perlu dibuat ke atas orang yang namanya tersebut dibawah ini dengan tujuan:

H

(b) menghapuskan kekerasan*

(c) mencegah jenayah melibatkan kekerasan*

I

Nama	No Kad Pengenalan
Tee Yam	580307–10–5485

Maka, oleh yang demikian, pada menjalankan kuasa yang diberi dibawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, saya dengan ini memerintahkan supaya orang yang namanya yang tersebut di atas ditahan selama dua (2) tahun mulai dari 24 haribulan Mei 2004 di Pusat Pemulihan Akhlak, Simpang Rengam Johor atau di mana-mana tempat lain sebagaimana yang diarah dari semasa ke semasa.

Diperbuat pada 24 Mei 2004

tt

(Dato' Noh bin Hj Omar)
Timbalan Menteri Keselamatan Dalam Negeri Malaysia.

ORDINAN DARURAT

(Ketenteraman Awam dan Mengenai Jenayah) 5/69

Nama Orang Tahanan: Tee Yam
No Kad Pengenalan: 580307–10–5485

ALASAN-ALASAN YANG ATASNYA PERINTAH ITU DIBUAT

Bahawa kamu adalah ketua Geng 21 (Cina) yang bergerak aktif di kawasan sekitar Lembah Klang yang telah melibatkan diri dalam kegiatan jenayah bercorak kekerasan.

PENGATAAN-PENGATAAN FAKTA YANG ATASNYA PERINTAH ITU DIASASKAN

Bahawa kamu adalah ketua Geng 21 (Cina) yang bergerak aktif di kawasan sekitar Lembah Klang yang telah melibatkan diri dalam kegiatan jenayah bercorak kekerasan, Di antara kegiatan jenayah kekerasan yang kamu telah terlibat ialah:

(1) Bahawa kamu dalam tahun 2000, jam lebih kurang 2ptg bertempat diRestoran Mee Sim, Pandan Indah, Ampang, Selangor, kamu bersama dengan beberapa orang rakan sejenayah kamu telah mengugut akan mendatangkan cedera parah kepada mangsa sekiranya mangsa gagal menyelesaikan masalah hutang. Kamu juga telah memberi ugutan bunuh kepada mangsa sekiranya lanjutan tempoh masa membayar hutang yang diberikan oleh kamu gagal ditunaikan oleh mangsa dalam tempoh tersebut.

(2) Bahawa kamu dalam tahun 2001, jam lebih kurang 5ptg, bertempat dipejabat VCD City Gold, Pandan Indah, Ampang Selangor, kamu bersama seorang lagi rakan dengan bersenjatakan besi paip telah memukul seorang lelaki cina sehingga pengsan, atas alasan mangsa tidak menyerahkan wang hasil kutipan kedai video game kepada syarikat kamu.

(3) Bahawa kamu pada awal bulan Jun 2001, jam lebih kurang 11.30mlm, bertempat di Emico Nite Club, Jalan Loke Yew, Kuala Lumpur, kamu dengan bertemankan rakan sejenayah telah menampar dan menumbuk mangsa kerana hal tidak membayar hutang. Kamu juga telah memberi ugutan kepada mangsa jika gagal menyelesaikan hutang dalam tempoh

tiga hari, kesemua kedai mesin perjudian milik-mangsa akan dibakar oleh kamu. Akihat dari serangan tersebut mangsa telah mendapat kecederaan di bahagian muka.

(4) Bahawa kamu pada masa perayaan Tahun Baru Cina tahun 2002, jam lebih kurang 12.20mlm, bertempat di rumah No 35, Jalan 24/119, Taman Tayton View, Cheras, Kuala Lumpur, saksi bersama tiga lagi rakan telah mengeluarkan sepucuk pistol lalu melepaskan tiga das tembakan ke udara sambil bertanya kepada rakan-rakan yang hadir adakah bunyi pistol baru kamu itu kuat, sehinggakan saksi yang melihatnya berasa bertambah takut ke atas kamu.

(5) Bahawa kamu pada penghujung bulan Mac 2002, jam lebih kurang 11.15mlm, bertempat di Bilik 888, Emico Nite Club, Jalan Loke Yew, Kuala Lumpur, kamu dengan bertemankan rakan sejenayah telah memukul mangsa yang bekerja sebagai GRO di kelab malam tersebut atas alasan mangsa tidak mahu mengikut arahan kamu dan kamu juga telah mengugut akan memukul dan menembak pelanggan mangsa sekiranya ingin campur tangan di dalam urusan tersebut. Akibat dari kejadian tersebut mangsa mengalami kecederaan di bahagian muka.

(6) Bahawa kamu pada 8 April 2002, jam lebih kurang 2ptg, bertempat di kaki lima Restoran Pertama di Pandan Jaya, Ampang, Selangor, kamu yang bertindak sebagai perancang satu kes pembunuhan telah mengarahkan dua orang rakan sejenayah kamu untuk membunuh saksi. Walau bagaimanapun rancangan tersebut telah mengalami kegagalan kerana rakan sejenayah kamu telah tersalah tembak rakan kamu sendiri sehingga menyebabkan kematiannya.

(7) Bahawa kamu pada 30 September 2002, jam lebih kurang 7.45ptg, bertempat ditingkat bawah Kiss Me Disco, Carrefour, Sri Petaling, Kuala Lumpur, kamu telah membawa lebih kurang 150 ahli kumpulan kamu di mana kamu telah memaki saksi 'jika lu ada satu pucuk pistol, saya anytime ada 10 pucuk pistol'. Kejadian ini berpunca disebabkan kamu mensyaki saksi adalah orang yang telah memukul orang-orang kamu.

(8) Bahawa kamu pada satu hari selepas perayaan Tahun Baru Cina dalam bulan Februari 2003, jam lebih kurang 2pg, bertempat dihadapan Reception Counter di Pusat Hiburan Bintang Palace, Jalan Palmer Off Jalan Imbi, Kuala Lumpur, kamu telah menumbuk dan menampar mangsa beberapa kali sehingga menyebabkan mangsa mengalami kecederaan dan terpaksa mendapatkan rawatan di hospital. Punca kejadian itu adalah disebabkan mangsa telah tidak dapat memberi layanan yang istimewa dan memberi muka kepada kamu disebabkan kesibukan masa bekerja mangsa ditempat tersebut.

(9) Bahawa kamu pada 31 Julai 2003, jam lebih kurang 1pg, bertempat diBIBI Pub, Bangunan PGRM, Jalan Shamelin, Cheras, Kuala Lumpur, kamu bersama sekumpulan lelaki cina telah bertengkar dengan sekumpulan lelaki cina yang lain, dimana di dalam kejadian tersebut kamu telah menampar muka seorang lelaki cina dari kumpulan tersebut. Apabila mangsa bersama dengan rakan-rakannya keluar dari Pub tersebut ke tempat letak kereta, kamu telah ikut daripada belakang dengan mengeluarkan

sepucuk pistol daripada pinggang kamu dengan tujuan hendak menembak lelaki cina tersebut, walau bagaimanapun rakan-rakan yang bersama dengan kamu telah menghalang kamu daripada melepaskan tembakan.

(10) Bahawa kamu pada penghujung bulan Februari 2004, iaitu empat hari selepas tahun baru cina, jam lebih kurang 9.30mlm, bertempat di tingkat satu di pejabat kamu dengan bersenjatakan kayu, kamu bersama beberapa orang rakan sejenayah telah menampar dan memukul mangsa disebabkan mangsa tidak dapat menjelaskan ansuran pinjaman yang telah dibuat oleh mangsa. Akibat daripada serangan tersebut mangsa telah mengalami kecederaan sakit-sakit dibahagian badan dan tulang mangsa telah terkehel.

Dengan Arahan

Timbalan Menteri Keselamatan Dalam Negeri

tt

(ZAITUN ABD SAMAD)
Timbalan Setiausaha Bahagian
Kementerian Keselamatan Dalam Negeri

Tarikh: 24 Mei 2004

(Ruj: KAMJ – 15287)

NOTIS MEMBUAT RAYUAN

ORDINAN DARURAT (KA & MJ) 1969

Kamu: Tee Yam KP 580307–10–5485 adalah dengan ini diberitahu bahawa kamu berhak dibawah s 5(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, membuat rayuan terhadap perintah tahanan yang diperbuat oleh Timbalan Menteri dibawah s 491) Ordinan tersebut (Perintah yang mana telahpun diserahkan kepada kamu) dan rayuan ini mesti dikemukakan kepada setiausaha Lembaga Penasihat dalam tempoh masa 14 hari daripada tarikh kamu tiba di pusat tahanan yang tersebut di dalam perintah tahanan itu.

Notis hak membuat rayuan telah dibaca/diterjemahkan kepada orang tahanan tersebut oleh: P/DSP Lee Kam Choy G/6769 (Jurubahasa)

Pengakuan oleh orang tahanan bahawa notis hak membuat rayuan telah dibacakan/diterjemahkan kepadanya.

24 Mei 2004/1710 tt

Tarikh/Masa Tandatangan/tanda orang tahanan

Penterjemah: tt

[3] The following facts are not in dispute, the applicant was arrested at 2.30pm on 26 March 2004 at a restaurant known as 'Eat Sun Hongkong' of Jalan Walter Grenier, Kuala Lumpur, by one who is now Acting Deputy of Superintendent of Police Samat bin Rasmani (Samat), pursuant to s 3(1) of the EO 1969. The police detained the applicant for 60 days, ie from 26 March 2004 to 24 May 2004. At 5.10pm on 24 May 2004, the Minister directed the applicant to be detained for a period of two years from 24 May 2004. Sometime between 24 May 2004 and 26 May 2004, the applicant made representation to the advisory board ('AB'). The AB heard the representation for eight full days, ie on dates between 6 July 2004 to 24 August 2004. At the AB hearing, two witnesses were summoned by the detaining authority, while eight witnesses including the applicant were summoned by the applicant. The detaining authority summoned one rebuttal witness. By letter dated 16 December 2004, it was conveyed to the applicant that the Yang di-Pertuan Agong had affirmed the order of detention.

[4] Dato' Muhammad Shafee Abdullah for the applicant raised a gamut of issues. He commenced his submission with an attack on the 10 allegations of fact (hereinafter respectively referred to as allegation 1 — allegation 10) and the conduct of the AB hearing. He argued as follows. Allegation 1 merely stated that the alleged act was committed in 2000. There was a Restaurant Mee Sim, but it was at Pandan Jaya and not Pandan Indah as alleged. During the AB hearing on 12 July 2004, the AB allowed the address of Restaurant Mee Sim to be explained away. It should not be so. By doing so, the AB had stepped into the shoes of the Minister. Allegation 2 also failed to state the specific date of the alleged act. There was no such entity as VCD City Gold. Allegation 3 concerned an alleged incident in early June 2001. But in early June 2001, between 27 May 2001 to 4 June 2001, the applicant was overseas (for the applicant's passport, see encl 2 exh TY4). The applicant could not have committed the act in allegation 3. Allegation 4, that the applicant discharged his firearm in his house, is not denied. But it was not stated that the applicant was licensed to carry a firearm, and the Minister could have laboured under the impression that the applicant was in possession of an illegal firearm, and that could have been a determining factor. In relation to allegation 5, the applicant was and is the majority shareholder of Emico Night Club, Jalan Imbi, Kuala Lumpur. At the AB hearing on 12 July 2004,, the investigation officer said that the alleged victim and guest relation officer were alone in room 888. But room 888 was never let to a single client for the whole of the latter half of March 2002.The bills in encl 2 exh TY5 showed that room 888 was never let to a single client alone. Allegation 6, that the applicant planned murder, was absolutely baseless. The supposed witness was one Foo Chee Wong ('Wong'). But Wong denied having given any witness statement to the police (see encl 3 exh MSA8). Allegation 6 was without witness foundation, as the alleged witness had retracted his statement. The only evidence to

support allegation 6 was in p 43 of the AB hearing on 12 July 2004, and it was not sufficient to make out allegation 6. At the AB hearing on 13 August 2004, three witnesses of the applicant refuted that the deceased could have stated the name of the applicant as alleged by Wong (see p 23 of AB hearing on 13August 2004, pp 24, 28 of AB hearing on 18 August 2004). Wong disappeared immediately after the shooting. Allegation 7 is denied. As for allegation 8, that the applicant beat up his mama-san, one Michelle Lai, Michelle denied that she had been beaten up (see pp 7 and 8 of the AB hearing on 10 August 2004). The medical record of Michelle was not secured, and there was no corroboration for allegation 8. At the AB hearing on 13 July 2004, one Francis, who sent Michelle to hospital, said that the applicant had not assaulted Michelle. As for allegation 9, Bibi Pub never existed, and the allegation was denied (see pp 49 of AB hearing on 12 July 2004). It should be Bibi Pub & Lounge. As for allegation 10, the date was changed to 2003 from 2004, and the accuser had given an incredible story. Allegation 10 was the most glaring fabrication by whoever had made that story. At the AB hearing, it was pointed out that the Chinese New Year could not have been at end of February 2004. In 2004, CNY fell on 22 January 2004, and the CNY festive season of 15 days was over on 5 February 2004. Allegation 10 contained an erroneous date, and the alleged act could not have happened. At the AB hearing on 13 July 2004, the detaining authority attempted to amend the date. An objection was raised on behalf of the applicant, as the material must stand exactly as it was before the Minister. The AB should not supplant its own dates for dates considered by the Minister. The officer who recorded the corrective statement from the witness to allegation 10 was not called to testify before the AB, and that put paid to allegation 10. The main allegation was that the applicant was the leader of Gang 21 active in the Klang Valley. But not a single member of Gang 21 was called to give evidence. There was not even a suggestion by the investigation officer that Gang 21 existed. The applicant's denial at the AB hearing of his knowledge of Gang 21 was not contradicted. There was no evidence that the applicant was the leader of Gang 21. All 10 allegations suffered from imprecision and vagueness (counsel referred to *Mok Han Liang v Timbalan Menteri Dalam Neaeri Malaysia & Ors* [1996] 5 MLJ 74 at held 3; *Ram Bahadur Rai v State of Bihar* 1975 Cri LJ 269; *Sukumar a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors* [2000] MLJ 305). Allegation 10 was shown out at the AB hearing to be vague, imprecise and therefore bad. The factual basis was lost. Procedure-wise, that would mean that the Minister had considered erroneous facts. Then turning to the conduct of the AB hearing, learned counsel argued as follows. The AB had not fairly conducted the hearing to the extent that the audi alterum partum rule was not complied. Sought particulars of the allegations were not given. Section 5(2)(b) contemplates particulars to be furnished to facilitate the representation. Vital fundamental particulars, without which an intelligent defence could not be conducted, were not supplied. Even the gist of statements by witnesses was not provided. The AB should not refuse the

sought particulars. The AB would have recommended against the applicant, and that was not reasonable. The AB should disclose its recommendation and supporting grounds. The court could scrutinise the AB proceedings for fairness. It was a perverse recommendation by the AB. Material before the AB should also be in the possession of the applicant. Otherwise, the right to make representation is illusionary. Since there was a failure to provide particulars, there was a failure in procedure in the proceedings before the AB. There was no representation, as the applicant was denied effective representation. Learned counsel next turned to section 7C of the EO 1969 and contended that section 7C is unconstitutional. Section 7C does not protect the AB. and or police. 'Traditionally, the court can look into the subjective matter and not just procedure. There is no limit to the power of the court under art 5(2).' There should be a liberal construction of art 5(2). Article 5(2) was not considered in *Keraiaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81. On 'subjective satisfaction' and 'judicial review', learned counsel referred to *Khawaja v Secretary of State for the Home Department* [1983] 1 All ER 765 at held 2 and at pp 772, 774, 777, 781, and 784. 'Section 7C dilutes art 5(2) and therefore should not operate to stop an investigation of the facts'. In *Mohamad Ezam bin Mohd Nor & Ors v Menteri Dalam Negeri & Anor* [2003] 2 MLJ 364 the focus was on s 73 and not s 8 of the Internal Security Act 1960. At p 468, the Federal Court held that s 73 is subject to an objective test. All witness statements were taken after the arrest of the applicant. At p 467, the Federal Court held that there could not be an arrest without basis and that a case could not be built up only during the 60 days police detention. The initial arrest must be on the basis of belief of a detention under s 4. In para 4 of encl 20, Acting DSP Samat affirmed he had reason to believe. But in his earlier affidavit (encl 11) he had not addressed s 3(1). The investigation officer merely replicated the provisions of s 3(1). Thereason for belief was not revealed. Enclosure 20 was short on specifics. Atp517, Siti Norma FCJ held that the detenu must be informed of the reason for arrest. In paras 41—46 of encl 2, the applicant denied that he was told of the reasons for his arrest. In the *State (Trimbole) v The Governor of Mountjoy Prison* [1985] IR 550, the court held that it should not allow a conscious and deliberate violation of rights to reach its planned result. Article 40 of Ireland is in *pari materia* with art 5(1) of Malaysia. The interrogation of the applicant was to fish for incriminatory evidence, and that interrogation was *mala fide*. Itshould seem strange that seven or eight witnesses would give their statements to the police during the 60 days police detention, on activities allegedly committed some two to four years past. There were three or four witnesses who gave their statements about one or two months before the arrest. Otherwise, allwitness statements were recorded during the 60 days police detention. Inparas 41–46 of enclosure 2, the applicant denied he was told of the reason for arrest, and denied all knowledge of Gang 21. The duty to inform had not been discharged. The explanation as averred could not have conveyed in any intelligible manner the reason for arrest, and fell short of the requirement of

art 5(3) (counsel referred to *Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92). Communication of the reason for arrest should not be a perfunctory act. There was a breach of art 5. There should be a sufficient disclosure of facts (counsel referred to *Indian Constitutional Law* by MP Jain (4th Ed, Reprint 1994) at p 602, *Blackstone's Criminal Practice 1999* at p 929, *Archbold Criminal Pleading, Evidence and Practice 1997* at pp 15 –183, and to the judgment of Lord Parker CJ in *Re Mourat Mehmet* [1962] 1 All ER 463, at p 464).

[5] Counsel contended that detention was *mala fide* on account of the following. When arrest was made, the police must be objectively satisfied that the applicant was involved in crimes of violence and that arrest was necessary. At p 467 of *Mohamad Ezam*, it was held that arrest could not be made for the purpose of building up the case. The entire case was build up whilst the applicant was under police detention, although three witness statements were recorded about 1 – 1½ months before the arrest. Section 3(1) must be satisfied before arrest could be made. There was not an iota of evidence that the applicant was the leader of Gang 21. Since main allegation was not proved, the 10 allegations were of no help. Collateral purpose was also seen in the interrogation during police detention. The interrogation of the applicant on his relationship with the former IGP also showed a collateral purpose. Thecollateral purpose was a personal vendetta of certain police officers. Sergeant Murthi 'disturbed' the defence at the AB. There were six witnesses to those 10 allegations. The investigation was cavalier in manner. The Act was misused. Witnesses suddenly appeared and gave statements whilst the applicant was under police detention. The classic fabrication was allegation 6. Wong, the alleged witness, denied having given any statement of the sort as alleged by the police. It was said that Michelle was assaulted but her medical record was not obtained and not produced. The discharge of firearm only warranted forfeiture of the firearm but not preventive detention. If the Minister were aware that the firearm was licensed, the decision under s 4 could have been different. The benefit of doubt must be given to the applicant. Preventive detention must be based on evidence as good as that for conviction by a court, but resorted to for reasons of security. Throughout the 60 days police detention, the applicant was denied his right under art 5(3). Counsel was only allowed to interview the applicant in the presence of at least four police officers. Counsel could not advise freely. Denial of counsel is specie of *mala fide*, but if deliberate would warrant a writ of *habeas corpus*. Right to counsel has not been taken away, and foreign authorities on the right to counsel could be a guide. Right to counsel must be real, and not illusionary as in the present case. Then turning to a fresh issue, counsel contended that the allegations of fact should but were not signed by the Minister, and hence there was no proof of the subjective satisfaction of the Minister.

[6] Senior federal counsel, Dato' Mohd Yusof Zainal Abiden for the respondents submitted that the right to counsel is not immediate right to

counsel', and that it was held in *Ooi Ah Phuav Officer-in-Charge, Criminal Investigations, Kedah, Perlis* [1975] 2 MLJ 198 that denial of counsel as sole ground is not sufficient for the grant of *habeas corpus*. The proviso to s 4 provides that the Internal Security (Detained Persons) Rules 1960 shall apply to every place of detention and to all persons detained. Rule 81(5) provides that an officer shall be present and be within earshot and sight. Siti Nortna Yaakob FCJ in *Mohamad Ezam* did not say that denial of counsel warrants the grant of *habeas corpus*. Validity of detention is not affected by denial of counsel. Denial of counsel could only support a case of *mala fide* and that the Act was used for a collateral purpose. Siti Norma Yaakob FCJ clearly answered that denial of counsel is no ground for the grant of *habeas corpus*. There is no procedural requirement for the Minister to sign the allegations of fact. Allegations of fact need not be signed (SFC referred to *Chan Ng v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1995] MLJU 419). The Minister ordered detention based on the information in the file and not on the allegations of fact. The Minister acts on the file, while the allegations of fact are to inform and to enable the detenu to prepare his representation. Sections 4 and 5 operate one after the other, and it is not necessary for the Minister to sign the allegations of fact. The Minister had considered the reports. The allegations of fact were prepared after subjective satisfaction. *Che Su bte Shafie v Superintendent of Prisons, Pulau Jerejak, Penang* [1974] 2 MLJ 194 had dealt with this point. There was no breach of s 5(2). Where it concerns an emergency legislation, interpretation must promote the objects, and where there is more than one construction, interpretation must lean towards the state (SFC referred to *Public Prosecutor v Khong Teng Khen* [1976] 2 MLJ 166, at p176). Article 5(2) and s 5(2) only come into play after the making of the detention order. Section 5 operates after s 4 has been exercised. Section 5 is the mechanism to facilitate the representation. Allegations of fact are furnished after the Minister has made his order under s 4. The signature of the Minister's secretary on the allegations of fact does not reflect on the non-application of the subjective mind. The signature of the secretary instead of the Minster is not a procedural defect. The non-signature of the Minister is not fatal, so long as the allegations of fact have been conveyed. In *Aminah*, the court held that who actually informed is not important so long as the detenu was informed. The applicant is detained by an order of the Minister. Any challenge must be on a question of non-compliance with s 4 and the provisions thereafter. Non-compliance with the preceding sections cannot be raised. Even if there were non-compliance with s 3, the validity of detention under s4 is not affected (SFC referred to *Ooi Ah Phua* at p 201, *PE Long v Menteri Hal Ehwal Dalam Neaeri Malaysia* [1976] 2 MLJ 133, at p 135 and *Re Onkar Shrian* [1970] 1 MLJ 29, at p 30, *Koh Yoke Koon* [1988] 1 MLJ 45, at p 48, and *Nasharuddin* at p 100). The effect of *Nasharuddin* is that the order of the Minister is not tainted by any prior failure in procedure. The AB must consider the representation and make a recommendation. But it was not the duty of the AB to conduct a hearing and to look for proof of the allegations. The duty

was to furnish the allegations of facts. There was no duty to furnish the sought particulars, which were not necessary for the making of a representation. The sought particulars were more that the requirements of law. The production of documents is subject to s 11 of the EO 1969. It was within the powers of the AB not to order the sought particulars to be furnished. The court cannot examine the allegations of fact. The court cannot sit in judgment of the act of the AB, for that would tantamount to questioning the subjective satisfaction of the Minister and or the Act of the Yang di-Pertuan Agong. The AB proceedings are not subject to judicial review. *Mohamad Ezam* at p 478 only said that general information, but not the evidential details, is to be furnished. Flaws in the allegations of facts do not affect the legality of detention. On 2 June 2005, the Federal Court in *Lee Kew Sang v Timbalan Menteri* [2005] 2 MLJ 631 held that *mala fide* is not a ground for the grant of *habeas corpus* in view of s 7C or other comparable provision. Section 7C is not *ultra vires* the Constitution.

[7] In reply, Dato' Muhammad Shafee said that there was a breach of natural justice, as the particulars before the AB were not equally before the applicant. Rule 81(5) only provides for wardens and not police officers to be present. Denial of counsel lends credence to the allegation that detention was *mala fide*. There was no evidence of the personal satisfaction of the Minister. It was admitted that the allegations of fact were not considered. There was no nexus between the detention order and the allegations of fact. In encl 20 para 13, it was admitted that it only upon interrogation that it established that the applicant was the leader of Gang 21. Prior to interrogation, there was no basis for the reason to believe. If the representation hearing was badly conducted then there was no representation.

[8] In relation to those arguments, it is essential to reflect on the law. Tobegin with, art 5(1) of the Constitution provides that 'no person shall be deprived of his life or personal liberty save in accordance with law'. Article5(2) provides that 'where complaint is made to the High Court or any judge that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him'. 'The writ of *habeas corpus ad subjiciendum*, commonly known as the writ of *habeas corpus*, is the prerogative for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison or in private custody. The illegal detention of a subject, that is detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus*' (*Re Tan Sri Raja Khalid bin Raja Harun: Inspector General of Police v Tan Sri Rala Khalid bin Raja Harun* [1984] 1 MLJ 182, at p 184, per Salleh Abbas LP).

[9] At the same time, art 149 provides that if an Act of Parliament-contains a recital as is mentioned in art 149(1), then any provision of law designed to

stop or prevent the activity stated in the recital 'is valid notwithstanding that it is inconsistent with any of the provisions of arts 5, 9, 10, 13, or would apart from this article be outside the legislative power of Parliament ...' (for authorities on the validity of legislation falling under art 149, see *Re Tan Sri Raja Khalid; Ketua Polis Negara v Abdul Ghani Haroon* [2001] 4 MLJ 11; *Ketua Polis Negara & Anor v Gan Bee Huat and other appeals* [1998] 3 MLJ 86; *Gurcharan Singh a/l Bachittar Singh v Penguasa Tempat Tahanan Perlindungan Kamunting Taiping* [1997] 4 MLJ 123; *Low Soon Mooi v Menteri Hal Ehwal Dalam Negeri & Anor* [1989] 2 MLJ 350; *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157; *Public Prosecutor v Yee Kim Seng* [1983] 1 MLJ 252; *Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 1 MLJ 82; *Musa bin Salleh v PP* [1973] 1 MLJ 167: *Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129; *Nasharuddin* at p 92; see also *Chong Kim Lau v Timbalan Menteri Dalam Negeri Malaysia & Anor* [1989] 3 MLJ 121, where it was held by Edgar Joseph Jr J as he then was, that art 49 overrides art 5(4). Under the law, the EO 1969, promulgated under art 150(2) but by reason of art 150(2C), is an Act of Parliament (on art 150, see *Halsbury's Laws of Malaysia* (Vol 2) paras 20.122–20.124). But art 149 is not without limits. In *Mohamad Ezam bin Mohd Noor v Ketua Police Negara & other appeals* [2002] 4 MLJ 449, it was held by the Federal Court per Siti Norma Yaakob FCJ, as she then was, that art 149 only validates provisions contrary to or inconsistent with art 5 (relating to personal liberty), with art 9 (relating to prohibition of banishment and freedom of movement), with art 10 (relating to freedom of speech, assembly and association) and with art 13 (relating to rights to property), but not with art 5(3) (relating to the right to be informed of the grounds of arrest and the right to consult and be defended by counsel). And in *Public Prosecutor v Dato' Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, it was held by Abdoolcader J as he then was, that no law enacted by virtue of art 149 can violate the provisions of art 8(1). Article 149 is apparently limited, *expressio unius est exclusio alterius*, to the scope and ambit of the recitals as is mentioned in clause (1). Suffice it to say that 'art 5 has, of course, to be read in the context of the provisions of art 149(1) of the Constitution but that does not imply that there should not be any strict adherence to and due compliance with the provisions of the Internal Security Act 1960' (*Soo Kua v PP* [1970] 1 MLJ 91, per Sharma J) the Dangerous Drugs (Special Preventive Measures Act) 1985, or the EO 1969, which are the three preventive detention laws made under art 149 (see *Re Muhamad Ali bin Hamid* [1999] 2 MLJ 703).

[10] Each latter Act/Ordinance empowers the Minister charged with the responsibility to order detention if the 'Minister is satisfied' that detention is necessary. But that power of the Minister is not absolute. For whenever a person deprived of his liberty challenges his detention, it is incumbent upon the authority who detains him to show that the detention is in the exercise of a valid legal power (see *Re Tan Sri Raja Khalid* at p 186), and that the power of detention which the law gives to the Minister, for reasons such as national

security, maintenance of essential services, public order, suppression of violence or the prevention of crimes involving violence, had been exercised strictly in accordance with the provisions of the relevant law. The following oft-quoted passage from the judgment of Edgar Joseph Jr J (as he then was) in *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri. Malaysia & Anor* [1991] 3 MLJ 28 at p 29, still mirrors the judicial position:

> There had been a consistent current of judicial opinion in our courts including the latest decisions of the Supreme Court which indicate that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so that the provisions of the relevant statute are rigidly and meticulously complied with (see for example *Tan Hoon Seng v Minister of Home Affairs Malaysia & Anor and another appeal* [1991] 1 MLJ 171, *Rajoo s/o Ramasamy v Inspector-General of Police & Ors* [1990] 1 MLJ 430 and a series of 11 recent appeals heard together, the first being *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals* [1990] 2 MLJ 297 in all of which the detainee succeeded on procedural grounds.

[11] Indeed, there is a host of authorities on the need to conform strictly to procedure, amongst which, from the apex court, are *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 3 MLJ 285 (at p 294, where it was held by Wan Yahaya SCJ, as he then was, that laws which deprive the subjects of their rights to personal liberty are subject to strict construction in the same way as is penal laws, that it is a recognised principle of interpretation that laws which encroach on the rights of the subject should be construed in conjunction with laws which guarantee the subjects' fundamental rights to freedom and whenever possible, to be so construed as to afford respect and recognition of such right, that the power under the restrictive laws can only be exercised in accordance with the procedure laid down by the law, and that in the event of any failure to conform to such procedure, the court may construe it in favour of the subjects' liberty), *Re Dato' James Wong Kim Min* [1976] 2 MLJ 245 (at p 251, where it was held by Lee Hun Hoe CJ (Borneo) that in a matter so fundamental and important as the liberty of the subject strict compliance with statutory requirements must be observed in depriving a person of his liberty, that the material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted, and that where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith), and, *Re Tan Boon Liat* [1977] 2 MLJ 108 (at p 114, where it was held by Lee Hun Hoe CJ (Borneo) that in such matter as fundamental as the liberty of the subject, it is of utmost importance that there should be strict compliance with the requirement of the Constitution and any law resulting in the deprivation of personal liberty, and that breach of such duty would not only affect the liberty but also render the continued detention after the three month period unlawful).

[12] Albeit in passing, Abdul Malek Ahmad FCJ, as he then was, in *Mohamed Ezam,* beginning at p 507, also maintained the stand that procedure must be strictly followed:

> Durga Das Basu in his textbook *Administrative Law* at p 544 of the 2000 reprint deals with *habeas corpus* thus:
>
> > The object of issuing the writ is to ascertain whether there is any legal justification for the detention of the person in custody. The merit of the case or the *moral* justification for imprisoning the petitioner is no relevant consideration in a proceeding for habeas corpus. Thus, a person charged with treason or murder is entitled to be set at liberty, if his imprisonment has not taken place in due course of law.
> >
> > A detention, thus, becomes unlawful not only where there is no law to justify it but also where procedure prescribed by the law which authorises the detention has not been followed, and, in determining whether such *procedure* has been complied with, the court applies a strict standard, not only in interpreting the terms of the statute but also in exacting a strict compliance with the requirements, so interpreted, in fact. The need for this strict standard was explained in the celebrated dictum of Brett U, in *Thomas Dale* (1881) 6 QBD 376 (at p 461):
> >
> > > It is a general rule which has always been acted upon by the Courts of England that if any person procures the imprisonment of another he must take care to do so by steps, *all* of which are *entirely* regular and if he fails to follow every step in the process with *extreme regularity* the court will not allow the imprisonment to continue.
> >
> > These words are echoed in the observation of Sastri CJ, of our Supreme Court in *Ram Narayan v State of Delhi* 1953 SCR 652 (at p 655):
> >
> > those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law. That has not been done in this case. Thepetitioners now before us are, therefore, entitled to be released, and they are set at liberty forthwith. (Emphasis added.)

[13] In saying that *habeas corpus* would lie on either constitutional or non-constitutional grounds, the author listed the latter as follows at p 549:

> Non-Constitutional
>
> (a) Where the order of detention is *ultra vires* the provisions of the Act, the order becomes a nullity and the detenu is entitled to obtain his release by *habeas corpus.* In India, this common law right to the restoration of liberty where it has been violated without authority of law has also been given a constitutional support by art 21, so that in every case where a person has been detained without the authority of law or under an order which is ultra vires, there is a violation of the constitutional guarantee under art 21,

and, consequently, on this ground an application under art 32 as well as under art 226 lies. A

(b) Apart from a plain transgression of the terms of the statute authorizing the detention, the detention may be illegal by reason of an abuse of the statutory power or a *mala fide* use of it and in such cases the detenu is entitled to obtain his release by *habeas corpus*. B

(c) It will be equally bad if the detaining authority did not apply his mind to the statutory requirements or acts upon a misconstruction of the statute or upon materials which have no rational probative value to the grounds of detention. (Emphasis added.)

[14] All three Acts/Ordinance prescribes that 'if the 'Minister is satisfied' that detention is necessary the Minister shall direct detention. But it is settled, that the prerequisite 'if the Minister is satisfied' reads to the effect as 'if the Minister is personally satisfied', and that the personal and or subjective satisfaction of the Minister is open not to judicial review. In *Minister for Home Affairs, Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29, the former Supreme Court per Abdul Hamid Ag LP, as he then was, held as follows: C D

> With all due respect to the learned judge, he would seem to have failed to distinguish between grounds of detention stated in the detention order and the allegations of fact supplied to the detainee. In particular he failed to recognise that whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not. E

[15] In short, 'the subjective satisfaction of the Minister to detain a subject is not open to judicial review' (*Athappen a/l Arumugam v Menteri Hal Ehwal Dalam Negeri. Malaysia & Ors* [1984] 1 MLJ 67 per Edgar Joseph Jr J as he then was). 'If it was true that the order came to be made in a casual or cavalier fashion, it cannot properly be said that the Cabinet or the minister concerned had been 'satisfied'. On the other hand, if the decision was made upon a proper evaluation of the facts and surrounding circumstances and after due deliberation, that was all that could be required for the issue of an order based on subjective 'satisfaction' (Karam Singh at p 141, per HT Ong CJ). 'My approach is therefore, firstly, to determine whether the applicant has been detained in the exercise of a valid legal power. It is for the detaining authority to prove the legality of the detention. Once that is proved it is then for the applicant to show that the power had been exercised mala fide or improperly or made for a 'collateral' or 'ulterior' purpose. The court will not inquire into the sufficiency, relevancy or otherwise of the allegations of fact. Whether or not the facts on which the order of detention is to be based are sufficient or relevant is a matter to be decided solely by the Minister of Home Affairs. The subjective satisfaction of the minister is not subject to judicial review' (*Patto a/l Perumal v Menteri Hal Ehwal Dalam Negeri & Anor* [1989] 1 MLJ 255 per Wan Adnan J, as he then was; see also *Nasharuddin* at p 100). F G H I

[16] But other than to require the detaining authority to show that the detention is in the exercise of a valid legal power and that the provisions of the relevant statute have been rigidly and meticulously followed, it is not for the court to investigate into the sufficiency of the reasons or grounds relied on by the detaining authority for arrest and detention. For it is settled law, that whether there is reasonable cause to detain is a matter of opinion and policy which can only be taken by the executive (see *Karam Singh*) that so long as the Minister is satisfied after considering all the information available to him, it is not for the court to question how or why he became so satisfied (*Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Chua Teck* [1990] 1 MLJ 104), that the subjective satisfaction of the Minister of Home Affairs is not subject to judicial review (*Karpal Singh*), that the fairness of the Minister's decision is subjective and that the court is only concerned with the procedural aspects of the exercise of executive discretion (*Theresa Lim Chin Chin & Ors v IGP* [1988] 1 MLJ 293), that courts do not sit in appeal against the decision of the Minister regarding the material on which the detention order was made (*Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [1988] 2 CLJ 274; *Yeap Hock Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279), that courts do not examine the adequacy or truth of these materials and cannot interfere with the decision on the ground that if the court had examined them it would have come to a different conclusion (*Wong Fook Nyen; Yeap Hock Seng*), and that the court cannot arrogate to itself the responsibility of judging the sufficiency or otherwise of the grounds (*Wong Fook Nyen*).

[17] The latter may be case law. But with the passing of the 1989 amendments (Acts A738, A739, & A740), it is written law that 'there shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power ... save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision'. Those amendments (Acts A738, A739, & A740) only allow *habeas corpus* applicants to challenge the Minister's order on grounds of procedural non-compliance (see *Lee Kew Sang*). In a word, there is no jurisdiction to review any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. The subjective satisfaction of the Minister is not .open to judicial review. Only questions on compliance with procedural requirements are subject to judicial review. Anything else 'is beyond the pale of challenge' (*Nadarajan v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications* [1994] 2 MLJ 657 per Selventhiranathan JC as he then was).

[18] Abdul Malek Ahmad FCJ in *Mohamed Ezam* at p 507, broke new ground in holding that the 'test for s 73 of the ISA is objective ... and (that the court) could enquire as to the reasons for the belief of the relevant arresting officers' in contradistinction to the view in *Tan Sri Raja Khalid* and *Theresa Lim* that the test

was subjective. That notwithstanding, it remains that the subjective satisfaction of the Minister is not open to judicial review.

[19] However, the court is within jurisdiction to look at the grounds of detention to consider whether they fall within the scope of the law (see *Karpal Singh* at p 31). The following authorities also made that absolutely clear. In *amaluddin bin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 1 MLJ 368, Anuar J as he then was, articulated as follows:

> It was argued by the learned senior federal counsel on behalf of the respondents that the order of detention is necessary to prevent an act prejudicial to the security of the country. The Minister having been satisfied that the applicant's act is prejudicial to the security of the country, that decision, based on the subjective test, cannot be challenged in court. With respect I do not agree with his argument. The court is not challenging or questioning the facts of the case. The allegations of fact upon which the subjective satisfaction of the Minister is based are not open to challenge or judicial review. The court is looking into the grounds of detention to consider whether they fall within the scope of the law which are open to challenge. It is obvious that the grounds as stated in the order are outside the scope of art 149 of the Constitution. Consequently the order of detention upon the grounds inconsistent with art 11 of the Constitution is outside the purview of the Internal Security Act and therefore not valid.

[20] On appeal, *Minister for Home Affairs. Malaysia & Anor v Jamaluddin bin Othman* [1989] 1 MLJ 418, the former Supreme Court per Hashim Yeop A Sani CJ (Malaya) said:

> It is already settled law in this country that whilst the grounds of detention as stated in the detention order are open to challenge if alleged to be not within the scope of the legislation, the allegations of fact are not subject to review. This principle was reiterated in *Minister for Home Affairs Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29. Thus the only question for us to determine here is whether the grounds are within the scope of the Act.

[21] In *Re Tan Boon Liat* at p 84, Abdoolcader J (as he then was) said:

> I held in my judgment in *Yeap Hock Seng v The Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279 that although the courts are precluded from adjudicating on the sufficiency of the subjective satisfaction of the Minister they can examine the grounds disclosed by the Minister for the detention to see whether they are germane and relevant to the object which the Ordinance prescribes. In other words, it is open to the courts, in determining the validity of any order of preventive detention, to consider whether the grounds of the detention fall within the scope of the law as the preventive detention under which the order professes to be made. An order of detention based on irrelevant grounds is invalid and if any of the grounds furnished to the detenu are found to be irrelevant while considering the application of the relevant legislation under which the detention is ordered and in that sense are foreign thereto, the satisfaction of the detaining authority on which the order of detention is based is open to challenge and the detention order liable to be quashed (*Rameshwar Shjaw v District Magistrate, Burdwan & Anor* AIR 1964 SC 334).

[22] Other authorities that also upheld the standpoint that the court is entitled to look at the grounds of detention to consider whether they fall within the scope of the law and or illustrations on the court looking at the grounds of detention are *Kandupillai a/l Krishnan v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2004] 1 MLJ 85, *Wong Kiew Meow lwn Timbalan Menteri Dalam Negeri, Malaysia dan satu lain* [1994] 1 MLJ 714; *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor v Mohd Zambri* [1990] 1 MLJ 102; *Tuang Pik King v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 1 MLJ 301.

> ... courts may review an order for preventive detention if there is an allegation that a condition precedent for the making or the continuance of the said order has not been complied with, or if there is an allegation that the grounds of detention stated in the said order do not fall within the scope and ambit of that particular legislation under which the said order is made ...' (*Mohd Ali bin Mohd Radi v Director of Prison, Rehabilitation Centre, Pulau Jerejak, Pulau Pinang & Anor and other appeals* [1989] 1 MLJ 248 per Abdul Malek Ahmad J, as he then was), but not from the angle of the factual basis.

[23] In relation to the factual basis and challenge thereto, and also in relation to the representation to the Advisory Board, the leading case of *Karam Singh* is most instructive and worthy of reproduction in extenso, Ibrahim J explicated as follows:

> While the court may not review the allegations from the point of view of their vagueness as to the satisfaction of the authority in detaining an individual the court may review those same allegations as communicated to the detainee to determine whether they are too vague to enable him to make effective representation against his detention. The test to be applied is different for the two purposes. For the first the test is whether it is sufficient to satisfy the authority; for the second the test is whether it is sufficient to enable the detained person to make an effective representation. Article 151(1) of our Constitution is equivalent to art 22(5) of the Indian Constitution and in *Shibban Lai v State of UP* AIR 1954 SC 179 BK Mukherjea J at p 190 said:
>
> > It is true that the sufficiency of the particulars conveyed to a detenu in accordance with the provision embodied in art 22(5) of the Constitution is a justiciable issue, the test being whether they are sufficient to enable the detenu to make an effective representation.
>
> On what is a vague ground Kania CJ in *State of Bombay v Atma Ram* AIR 1951 SC 157 at p 164 observed:
>
> > What is meant by vague? Vague can be considered as the antonym of 'definite'. If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case. It is, however, improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it. That is a matter of detail which has to be examined in the light of the circumstances of each case. Ifon reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague.

> The only argument which could be urged is that the language used in specifying the ground is so general that it does not permit the detained person to legitimately meet the charge against him because the only answer which he can make, is to say that he did not act, as generally suggested. In certain cases that argument may support the contention that having regard to the general language used in the ground he has not been given the earliest opportunity to make a representation against the order of detention. It cannot be disputed that the representation mentioned in the second part of art 22(5) must be one which on being considered may give relief to the detained person.

Thus if the allegations furnished are capable of being intelligently understood and are sufficiently definite to enable the detainee to make a representation against the order of detention they cannot be called vague. Whether an allegation is vague or not depends on the circumstances of each case.

The applicant has denied all the allegations and has appeared before the advisory board. It cannot therefore be seriously said that he has not understood or been misled by those allegations or that those allegations are not sufficiently definite to enable him to make effective representations against the order. Even the allegations in paras 4, 5, 6 and 9 contain particulars sufficient in my view to enable the applicant to make effective representations before the advisory board. The dates on and places at and the purposes for which the alleged statements were made are given in those allegations. More particulars would no doubt be useful but it would be sufficient for the respondent to say that more particulars had not been given because of the national interest. With regard to allegations in paras 2 and 3 as I have said earlier those two allegations would not reasonably have affected the subjective satisfaction of the Cabinet and in any event the advisory board had explained to the applicant what they really were meant to be when he made his representations before the board. I may add here that though those two allegations as they stand may appear to be irrelevant for the subjective satisfaction of the Cabinet they cannot be said to be so vague as not to enable the applicant to make effective representations against his detention. There are sufficient and definite particulars in those allegations to show that applicant was associated with the two organisations and why those two organisations were banned by the Government. It would not therefore be difficult for the applicant to intelligently understand that those allegations had not been made against him merely because he was associated with those organisations as their legal adviser. It must necessarily be more than that and if he really considered that there were insufficient particulars in those two allegations he could have asked for more. The applicant had not asked for more particulars in respect of any of the allegations and in *Lawrence Joachim Joseph D'Souza v State of Bombay* [1956] SCR 382 Jagannadhadas J at p 390 said:

> The fact that he had made no such application for particulars is, therefore, a circumstance which may well be taken into consideration, in deciding whether the grounds can be considered to be vague. In the circumstances and having regard to the fact that words alleged is espionage activity at a time when relations between the two Governments on the affairs of Goa were somewhat delicate, we are inclined to think with the High Court, that the grounds cannot be considered to be vague.

A In the circumstances of this application and having regard to the fact that the allegations made against the applicant are connected with the national security I do not consider that the allegations of fact are vague and insufficient to enable the applicant to make effective representations against the order.

[24] Ong HockThye CJ (Malaya) enunciated as follows.

B In my view, when dealing with a question of fact, it will not do to wear blinkers, or to read the words of the order as strictly as one would construe an Act of Parliament or a penal or taxing statute. The grounds on which the detention order was made must be read in their proper context. The allegation, in categorical terms, was that since 1957 the appellant had consistently acted in a manner prejudicial to the C security of Malaysia. In the same paper itself were set out a series of allegations of fact. They indicate with unmistakable clarity that over a number of years till 1964 (when the appellant left these shores, a fact admitted in his own affidavit) the appellant followed a certain pattern of conduct and that since he reappeared on the Malaysian scene in March 1967 he had lost no time in involvement with the labour dispute in Bukit Asahan. After his detention he elected for a considerable time D to make no representations against the detention. Taking all this into consideration, can it be said that he was ever in the dark about what, in truth, was the sole and substantive ground for his detention or that he was so embarrassed, through ignorance of the ground for his detention, that he was unable to make proper representations? This is a question of fact which the learned trial judge found against the appellant. E Mine is a concurrent finding. Having so found I would treat the irrelevant grounds as immaterial surplusage. The appellant was not, for a moment, misled nor was he ever prejudiced thereby in any way. For my part, I see no reason to put such a strict construction on wording that the surplusage — nothing more than a technical defect — should be held to invalidate the order.

F **[25]** Suffian FJ, as he then was, dealt with the (third) argument 'that the allegations of fact supplied to the appellant are vague, insufficient and irrelevant, that such vagueness insufficiency and irrelevance hamper the appellant in the exercise of his right to make representations, and that this invalidates the original order of detention and therefore the appellant's detention is unlawful' as follows.

G I regret I do not agree with Dato' Marshall's submission. In my judgment, detention under an order of the Minister made under s 8 of the Internal Security Act is not illegal simply because the allegations of fact supplied to him in pursuance to art151(1)(a) and s 11 of the Act are vague, insufficient or irrelevant. I do not see any justification for reading into the Constitution or into the Act any provision to H the effect that any imperfection in the allegations of fact supplied to the detainee relates, as it were, to the original order of detention, and goes to its root, so as to render illegal the detention.

In this matter with respect I agree with the reasoning of the minority judgment (p149 supra) by Sastri J in *Atma Ram* AIR 1951 SC 157 that when the power to I issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention,

itwould be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation. Indeed, the logical result of the argument advanced by Dato' Marshall would be to invalidate s 8 of the Internal Security Act in so far as it purports to make the satisfaction of the Government the sole condition of a lawful detention.

Our law is quite different from that of India. First, as already stated, the power of detention is here given to the highest authority in the land, acting on the advice of Minister responsible to and accountable in Parliament, not to mere officials. Secondly, as already stated, here detention, in order to be lawful, must be in accordance with law, not as in India where it must be in accordance with procedure established by law. I have underlined the word 'procedure' twice in the extract (onp 149 supra) from Sastri J's minority judgment in *Atma Ram* AIR 1951 SC 157 above, to show the importance attached to procedure under Indian law. Thirdly, here a detainee is entitled, not only to two things, as in India, namely:

(1) to be informed of the grounds for his detention; and

(2) to be given an opportunity of making representations against the order of detention;

but also to two other things not available to a detainee in India, namely:

(3) to be informed of the allegations of fact on which the order is based, art 151(1)(a) and s 11(2)(a)(ii)of the Act; and

(4) to be furnished in writing with a statement of such other particulars, if any, as he may, in the opinion of the Minister, reasonably require in order to make his representations against the order, s 11(2)(b) (iii) of the Act.

In my judgment, if a detainee honestly feels handicapped by the vagueness, insufficiency or irrelevancy of the allegations of fact on which the detention order is based, he has clearly recourse under s 11(2)(b)(iii) of the Act to additional particulars. This right is totally absent in India where indeed the Supreme Court has held that after a detainee has been supplied with the grounds on which the order of detention has been made, as required by art 22(5), no further additional grounds may be supplied to him.

If I am wrong and if the law is that the vagueness, insufficiency and irrelevance of the allegations of fact supplied to the appellant-render his detention illegal, then in my view the test to be applied is that laid down by Kania CJ in *Atma Ram* AIR 1951 SC 157 in the passage already cited (on p 150) on which the learned Solicitor-General relies. I agree with Ibrahim J that the allegations of fact furnished to the appellant were capble of being intelligently understood and were sufficiently definite to furnish materials to enable him to make a representation against the order of detention and that therefore they were not vague.

The allegations cover nearly two and half pages of type-script in double spacing. They were supplied to the appellant on the day (18 May 1967) the order of detention was served on him. At the same time he was notified in writing of his right to make representations. Nine days later he arrived at the detention camp and then again he was informed of his right to make representations. He refused to avail

himself of this right. Eventually he did make representations with the assistance of counsel on 27 July 1967. There was no suggestion before or on that day that the allegations of fact supplied to the appellant were vague, insufficient or irrelevant, nor was any application made by him or his counsel for further particulars. As a result of what was said by the appellant to the advisory board, further inquiries were made by the police and when the further police information came up for consideration by the board, the board invited him to their next meeting on 27September. However, when the board sat on that day, the appellant was in hospital. The board invited him to their next meeting on 19 December, but he declined.

When the board invited him to attend their meeting in Malacca for a third time, on 27 February 1968 again he declined.

In view of this, I do not see how it can be said that the allegations of fact supplied to the appellant in any way hindered or prejudiced the representations he wished to make to the advisory board.

Finally, in my opinion, it is not for a court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him. The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.

The vagueness, insufficiency or irrelevance of the allegations of fact supplied do not relate back to the order of detention, do not go to the root of the order of detention and do not render unlawful detention under a valid order of detention. Still less do they do so if such vagueness, etc, in no way hinders or prejudices the detainee's right of making representations against the order of detention.

If the detainee honestly thinks that the allegations of fact are vague, insufficient or irrelevant, he should ask for particulars. Unlike his counterpart in India, he has here a legal right to particulars, subject to the Minister's privilege in the public interest.

In any event it is not for the court to judge the vagueness, sufficiency or relevance of the allegations of fact on which an order of detention is based. It is for the executive to do so.

[26] Ali FJ held similar views:

In the case of *Atma Ram* AIR 1951 SC 157, the argument raised was somewhat similar to the argument raised in the present case. At p 182, Kania CJ described it in these words:

> On behalf of the respondent, it was argued that if the grounds of detention are vague or insufficiently clear there will result a failure to give him the earliest opportunity to make a representation against the order of detention and that defect in its turn must affect the satisfaction on which the order of detention was made. It was argued that just as a ground which is completely irrelevant, and

therefore, in law is no ground at all, could not satisfy any rational person about the necessity for the order, a vague ground which is insufficient to enable the detenu to make a representation would similarly make the order of detention based on it, void. In our opinion, this argument is unsound.

It was put in different words by Das J at p 201:

The argument shortly put, is that the implied requirement that the grounds must be such as will enable the detenu to make a representation also indicates the quality or attribute of the grounds on which the order of detention may be made. Whether the grounds satisfy the requirements of art 22(5) is not left to the subjective opinion of the authority which makes the order of detention but an objective test is indicated, namely, that the grounds must be such as will enable the detenu to make a representation which quite clearly makes the matter justiciable.

At p 202, Das J went on to say:

The argument so formulated is attractive but on closer scrutiny will be found to be unsound .... It was held in many cases that in the absence of bad faith, and provided the grounds on which the authority founded its satisfaction had a reasonable relation or relevancy to the object which the legislation in question had in view, the satisfaction of the authority was purely subjective and could not be questioned in any court of law. The decision of the Federal Court in *Machindar Shivaji Mahar v The King* [1949-50] FCR 827, 831 is one of such decisions. Vagueness of the grounds on which satisfaction of the authority is founded cannot be treated as on the same footing as the irrelevancy of the grounds, unless the vagueness be such as may, by itself, be cogent evidence in proof of bad faith. If the grounds are relevant to the objects of the legislation and if there is no proof of bad faith, then mere vagueness of the grounds cannot vitiate the satisfaction founded on them.

Somewhat similar argument was raised in *The King v Secretary of State for Home Affairs, ex parte Lees* [1941] 1 KB 72. It was rejected and the judgment in that case reads:

The order, therefore, follows strictly the language of the regulation. It is argued that the order is bad for duplicity in that the two allegations of membership of and activity in connection with the objects of the organisation are stated in the alternative. It is said that they afford separate grounds for the making of an order and that one or other or both of those grounds of belief should appear as the reason for making the order. In our opinion there is nothing in the point. The document in question is hot a conviction nor an indictment nor even a charge. Grammatically, it may be perfectly correct to say that the Home Secretary had reasonable cause to believe that the applicant was either a member of or was active in the furtherance of the objects of the association so as to justify the making of the order.

It might, with equal force, be urged that the words 'to have been or to be' render the order bad upon the face of it. We find nothing in the statute or the regulations requiring that the order should be in any particular form and, in our judgement, the order is not invalid upon this ground.

A For the reasons stated, I would reject the appellant's argument that the detention order was bad.

The appellant raised similar argument in respect of allegations of fact saying that they were vague, insufficient and irrelevant. For the reasons already stated it must equally be held to be unsound and must also be rejected.

B

Both in respect of grounds of detention and in respect of allegations of fact, itcould have been argued that in the circumstances of this case there has been a breach of constitutional requirements set out in art 151(l)(a). If these have been argued, consideration will have to be given as to whether the continued detention of the appellant for a period exceeding three months was lawful in terms of **C** art151(l)(b) which provides:

> (a) no citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in clause (2) has considered any representations made by him under para (a) and made recommendations thereon to the **D** Yang di-Pertuan Agong.

It may be observed that at the time when the appellant commenced proceedings before the High Court, he has been detained for about nine months and the question of his being detained for a period exceeding three months could, therefore, be a proper question to consider.

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Unfortunately, no one has thought fit to argue the point as throughout these proceedings the argument was confined mainly to the question whether the order of detention was valid. In the absence of the argument which I have mentioned, itis not possible to say whether the continued detention of the appellant was lawful or otherwise.

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[27] Edgar Joseph Jr J, as he then was in *Athappen a/l Arumugam*, summed up the principles enunciated in *Karam Singh* and other authorities as follows.

To sum up, I would answer the question posed at the commencement of this judgment by enunciating the principles to be distilled from the various decisions **G** of our courts as follows:

(1) The subjective satisfaction of the Minister to detain a subject is not open to judicial review.

(2) The vagueness etc of the allegations of fact upon which a detention order is based does not relate back to the order of detention thereby **H** vitiating it.

(3) The mere fact that a subject has been detained under the law as to preventive detention following his acquittal in a Criminal Court does not ipso facto render his detention wrongful.

(4) Exceptionally, the courts will review the order for preventive detention if:

I (a) *mala fides* is alleged; or,

(b) it is alleged that the grounds of detention stated in the order do not fall within the scope and ambit of the relevant legislation; or

(c) it is alleged that a condition precedent for the making or the continuance of the order of preventive detention has not been complied.

[28] Abdul Malek Ahmad FCJ in *Mohamad Ezam* perceived *Karam Singh* as follows.

In *Karam Singh*, a five member panel of the Federal Court in dismissing the appeal against the decision of the High Court dismissing the application by the appellant for a writ of *habeas corpus*, held that:

(a) the learned trial judge was correct in holding that the appellant's detention had been made in the exercise of a valid legal power and therefore the onus lay on the appellant to show that such power had been exercised *mala fide* or improperly;

(b) the defect, if any in the detention order in setting out the objects and purposes of the detention in the alternative was a defect of form only and not of substance, it did not show that the executive had not adequately applied its mind to the desirability of detaining the appellant and therefore did not invalidate the order;

(c) the vagueness, insufficiency or irrelevance of the allegations of fact supplied to the appellant did not relate back to the order of detention and could not render unlawful the detention under a valid order of detention; if, however, the appellant thought that the allegations were vague, insufficient or irrelevant, he should have asked for particulars; and

(d) the question whether there was reasonable cause to detain the appellant was a matter of opinion and policy, a decision which could only be taken by the executive.

[29] Some other decisions that also upheld that the factual basis is beyond judicial scrutiny are *Henry a/l Arumanathan v Timbalan Menteri Dalam Negeri & Ors* [1995] 1 CLJ 683, *Saranavan a/l KS Somu v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 1 MLJ 399, *Sinnasamy a/l Subbiah v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2004] 1 MLJ 378, *Kandupillai a/l Krishnan, Wong Chee Kong v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [2000] 5 MLJ 228, *Lee Gee Lam v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1993] 3 MLJ 265.

[30] As it stands, there is no room for debate. The subjective satisfaction of the Minister, and allegations of fact on which the order of detention is based, are beyond judicial review. There is no jurisdiction to review save in regard to any question of non-compliance with any procedural requirement. That is the acid test ' ... in a *habeas corpus* application .. the first thing that the courts should do is to see whether the grounds forwarded is one that falls within the meaning of procedural non-compliance or not. To determine that question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such

procedural requirement then there cannot be non-compliance thereof'. (*Lee Kew Sang* per Abdul Hamid Mohamad FCJ).

[31] In the case of the instant EO 1969 (also true of the ISA and DDA), the Ordinance provides for police detention of up to 60 days, and detention by the order of the Minister for a period not exceeding two years, which latter detention may be extended, suspended or revoked. In relation to police detention, it proceeds under s 3(1), which provides that 'any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under s 4(1)', or under s 3(2), which provides that 'any police officer may without warrant arrest and detain pending enquiries any person who on being questioned by him fails to satisfy him as to his identity or as to the purpose for which he is in the place where he is found, if the police officer suspects that person of having acted or being about to act or being likely to act in any manner prejudicial to public order or if he has reason to believe that it is necessary for the suppression of violence or the prevention of crimes involving that that person should be detained'. Subject to the conditions prescribed in s 3(3), police detention may extend to a period not exceeding 60 days.

[32] Under s 3(1), the requirement is that the arresting officer 'has reason to believe that there are grounds which would justify his detention under s4(1)'. But what amounts to 'reason to believe', and who decides that issue?

[33] In *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2003] 1 MLJ 32, where the appellant was arrested by Detective Sergeant Abdullah bin Awang who informed the appellant that he was arrested under s 3(1) of the EO 1969 as there was reason to believe that there were grounds that would justify the appellant's detention, but had not disclosed to the appellant the information received that caused him to have the reason to so believe, and where it was contended that the arrest and detention of the appellant under s 3(1) violated art 5(3) and were consequently improper, it was held by a majority of the Federal Court, that s 3(1) only requires the arresting officer to have reason to believe that there are grounds but does not require the arresting officer to inform the arrested person of the grounds. For the majority, Ahmad Fairuz CJ (Malaya), as he then was, held as follows:

> Furthermore, s 3(1) only requires the arresting officer to have 'reason to believe that there are grounds ...'. It does not require the grounds to be informed to the arrested person. And even if it is so required because of art 5(3) of the Constitution, I am of the view that what the arresting officer had informed the appellant was sufficient compliance with art 5(3). The grounds were those that would justify a detention under s 4(1) of the Ordinance. Viscount Simon in *Christie & Anor v Leachinsky* [1947] 1 All ER 567 at p 572, said:
>
> > These citations, and others which are referred to by Lord Du Parcq, seem to me to establish the following propositions:

> The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima fac*ie, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed. (Emphasis added.

Obviously the appellant must have known in substance the reason for his arrest ie that he was arrested because there were grounds which would justify his detention under s 4(1) of the Ordinance.

[34] In *Mohd Ezam*, Steve Shim CJ (Sabah & Sarawak) held that in respect of s 73(l)(b) of the ISA, the detaining authority had to satisfy the court by way of material evidence that it had reason to believe that the appellants had acted or were about to act or were likely to act in a manner prejudicial to the security of Malaysia. As said, Abdul Malek Ahmad FCJ held the test for section 73 of the ISA was an objective test and the court could enquire into the arresting officer's 'reason to believe'.

[35] In *Re Tan Sri Raja Khalid,* at p 187, Salleh Abbas LP had held that the court could not inquire into the arresting officer's 'reason to believe'.

> In simple language, what s 73(1) of the Act provides is that a police officer may arrest any person in respect of whom the officer has reason to believe there are grounds to justify the person's detention under s 8 of the Act and that person either has acted or is about to act in a manner prejudicial to the security of the nation. The Penal Code defines 'reason to believe' to mean 'sufficient cause to believe'. Who then is to decide what is sufficient cause under s 73(1) of the Act? That is the crux of the matter.
>
> We hold that since s 73(1) and s 8 of the Act are so inextricably connected, the subjective test should be applied to both. The court cannot require the police officer to prove to the court the sufficiency of the reason for his belief under s 73(1).

[36] Perhaps the strongest argument against the objective test was advanced in *Theresa Lim*, and in *Re Ong Yew Teck* [1960] 1 MLJ 67.

[37] In *Theresa Lim*, Salleh Abbas LP said:

> Secondly, s 16 of the ISA and art 151 cl (3) clearly authorize the executive not to disclose any information relating to national security. In that event, the court could only be limited to what has been presented before it. The police officers who arrested the detainees have sworn affidavits to say that they have information which made them come to the opinion that they have reason to believe that there were grounds for detaining the appellants under s 8 of the Act, and that they are not prepared to disclose this information. Is the court then to declare that the arrest and detention are illegal for no other reason that these officers are not prepared to disclose the information? If there has been no provision of cl (3) of art 151 and s 16, the matter, of course, could be decided by the court, whether it was really in the interest of the security that such information could be withheld. Thus, in our view no inference

of illegality could be imposed on the arrest in the circumstances. It is therefore up to the appellants to show that the arrest and detention are illegal. *In other words, even if the test under s 73 is objective, nothing much can be done, in view of the lack of evidence and it is in this context that the court expressed the view that the test is subjective*. The expression 'subjective and objective tests' is merely a label to show the results of the court's attitude as to whether or not it will or it will not exercise its jurisdiction. It is descriptive of the result of the court's decision elicited from factual situations reflecting judicial attitude rather than a starting point or a legal element from which legal result could be arrived at. *In this case, whether the objective or subjective test is applicable, it is clear that the court will not be in a position to review the fairness of the decision-making process by the police and the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision. Thus, it is more appropriately described as a subjective test.* (Emphasis added.)

[38] In *Re Ong Yew Hock*, where the applicant was arrested and detained under s 55 of the Criminal Law (Temporary Provisions) Ordinance 1955, and where the applicant contended that the arrest was illegal because the detective corporal when making the arrest under s 55(1) of the Ordinance had no reason to believe there were grounds which would justify the detention under s 47, and that s 55(1) imposes an objective test and hence the court could examine whether there were in fact sufficient reasons to justify the detention, Chua J held that on the proper interpretation of s 55(1) read in conjunction with s 53 which precludes the disclosure of facts prejudicial to the public interest, the test was subjective, and that the court could not go behind the reason to believe.

I now come to the crucial point. Who is to decide the issue of 'reason to believe'? DSP Ong Kian Tiong himself or a court? *If it is for the court to decide then the court must have all the material evidence before it otherwise it would be futile to ask the court to decide.* It is quite clear that the information that DSP Ong has are confidential and s 53 of the Ordinance provides as follows:

> 53 Nothing in this Ordinance or in any rules made under s 59 of this Ordinance shall require the Chief Secretary or any other public servant to disclose facts which he considers it to be against the public interest to disclose.'

DSP Ong Kian Tiong therefore cannot be required to set out the grounds of his belief or to give the information which led him to the opinion which he formed. In fact in this case DSP Ong Kian Tiong has declared that it would be against the public interest to disclose names, dates, times, places and other details relating to the activities of the applicant.

For these reasons I am of the opinion that s 55(1) imposes a subjective test and as DSP Ong Kian Tiong honestly supposed that he had reason to believe the required thing this court cannot go behind his statement that he had such reason to believe. (Emphasis added)

[39] But subjective or objective, it still has to be that there must some basis for the 'reason to believe'. A 'reason to believe' must be founded on some factual basis, on information from intelligence and or from witnesses. Under s 3(1) of the EO 1969, a person may be arrested only if there is reason to believe that there are grounds which would justify detention under section 4(1). Itshould go without saying that in the absence of all information, there could and would not be any reason to believe that there are grounds which would justify detention under s 4(1). An arrest without information in hand would be arrest without 'reason to believe', and would be unlawful. To arrest under s 3(1) of the EO 1969, it is the procedural requirement that the arresting officer has reason to believe that there are grounds which would justify detention under s 4(1). 'Arresting the individual merely for the purpose of gathering intelligence with a view to detaining the person is not authorised under the ISA, or any other legislation for the matter' (*Mohamad Ezam* at p 467 per Mohamed Dzaiddin CJ). But in the instant case, it could not be said that the applicant was arrested without information in hand. In the first place, it was conceded that three or four witness statements were recorded about one or two months before arrest of the applicant. Furthermore, it was averred by the arresting officer. Acting DSP Samat, that given the information received on the applicant he had reason to believe that were grounds to justify detention under s 4(1), and that he disclosed the following information — 'kerana Pemohon merupakan seorang ahli kumpulan haram/kongsi gelap yang telah terlibat di dalam kegiatan-kegiatan yang mengancam ketenteraman awam dan kesalahan-salahan jenayah yang bercorak kekerasan' — to the applicant. Given so, it could not be true that the case against the applicant was entirely built up during the 60 days police detention.

[40] It was also averred by the said arresting officer that he explained in simple Malay to the applicant, ie after the applicant had answered that he understood Malay, the reason for arrest, to wit that there were grounds for detention under s 4(1) and related the following information 'Pemohon merupakan seorang ahli kumpulan haram/kongsi gelap yang telah terlibat didalam kegiatan-kegiatan yang mengancam ketenteraman awarn dan kesalahan-salahan jenayah yang bercorak kekerasan', that he instructed one Chief Inspector Chan Kuang Yu (Chan) to translate into Mandarin the reason for arrest to the applicant, and that Chief Inspector Chan first ascertained that the applicant understood Mandarin and then translated into Mandarin the reason for arrest. As for Chief Inspector Chan, he averred that he was instructed by Acting DSP Samat to translate into Mandarin the reason for arrest to the applicant, that he first ascertained that the applicant understood Mandarin and then explained in Mandarin the reason for arrest — to the applicant, that the applicant acknowledged that he understood his explanation in Mandarin, and that he then informed Acting DSP Samat that the applicant understood his explanation. It was contended that the explanation could not have conveyed

in any intelligible manner the reason for arrest, and that therefore there was a breach of art 5(3). But as said in *Christie & Anor v Leachinsky* and adopted with approval by the Federal Court in *Kam Teck Soon*, the requirement to inform does not mean that technical or precise language must used. 'The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed' (*Christie & Anor v Leachinsky* per Viscount Simon). In essence, the reason for the arrest was that the arresting officer had reason to believe that there were grounds which would justify detention under s 4(1). And reasonably, that averred explanation in simple Malay by Acting DSP Samat and then in Mandarin by Chief Inspector Chan, which was more than merely telling the applicant that he was arrested under some section of some enactment, should have conveyed the reason for arrest to the applicant, and should have been sufficient to enable the applicant to understand why he had been arrested. The denial by the applicant was not any material or sufficient material for to find a breach of the first limb of art5(3). A denial is not a credible rebuttal of the specific averments of Acting DSP Samat and Chief Inspector Chan that the reason for arrest was indeed communicated to the applicant (for an analogy, see *Mohamad Ezam* per Dzaiddin CJ). Moreover, on the matter of denials, Ali FCJ in *Karam Singh* had enunciated:

> Lastly, there is also the appellant's affidavit in which he categorically denies each and every one of the allegations of fact and contends in each case that even if the allegation is true, it cannot constitute a threat to the past or future security of Malaysia. In this connection, I shall be content to say that in *habeas corpus* proceedings, such as this, the court is not concerned with the truthfulness or otherwise of the allegations because the question whether it is necessary that a person be detained under s 8(l)(a) of the Internal Security Act 1960 is a matter for the personal or subjective satisfaction of the executive authority. Accordingly, no consideration can be given to the appellant's denial and no opinion need be expressed on his contentions.

[41] There was no breach of the first limb of art 5(3). In relation to the second limb of art 5(3), it was held by the Federal Court per Suffian LP in *OoiAh Phua* at p 201, that 'the juxtaposition of cll (2) and (3) of art 5 does not mean that a person who is denied immediate access to his lawyer has his remedy by way of *habeas corpus*, for it is yet possible for a person to be lawfully detained and yet unlawfully denied communication with his lawyer'. The Federal Court in *Ooi Ah Phua* expressly agreed with the following passage from the judgment of *Wee Choon Jin* CJ in *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1971] 2 MLJ 137, at p 141.

> In my judgment *habeas corpus* is not an available remedy to a person who, after his arrest by the police and under lawful detention by the police ... has been refused by

the police to be allowed his constitutional right under art 5(3) of the Constitution to be allowed to consult a legal practitioner of his choice. Such a person must seek other available remedies ....

[42] In *Mohamad Ezam*, at p 510, Siti Norma Yaakob FCJ reaffirmed the right to counsel, held that the 'ratio decidendi in *Ooi Ah Phua* and *Theresa Lim* places the burden on the detainee.to show that there had been a breach art 5(3) by the detaining authority', and further held that the latter is the test to be followed. But pertinently, to the question 'can *habeas corpus* lie to secure the immediate release of the appellants', Siti Norma Yaakob FCJ first re-evaluated *Lee Mau Seng*, *Ooi Ah Phua*, and *Sundar Singh v Emperor* 1930 AIR Lah 945, and then quite unambiguously answered that denial of counsel is not a ground for the grant of the writ of *habeas corpus*:

The rationale for refusing *habeas corpus* in the three cases that I have cited seems to be this. A complaint by a person while under lawful detention that he has been refused access to counsel contrary to the second limb of art 5(3) will not have the effect of rendering his detention unlawful and that habeas corpus is not the proper remedy. It would be otherwise if for example, there has been a failure to inform the person arrested of the grounds of his arrest, contrary to the first limb of art5(3) and such failure would render his subsequent detention unlawful. Clearly, it is the legal status of the detention that determines whether *habeas corpus* can issue to secure the freedom of detained person as guaranteed by art 5(2) of our Constitution.

[43] On the authority of *Mohamad Ezam*, the denial of counsel, if even made out, could not be a ground for the grant of the writ of *habeas corpus*. In any event, the applicant had access to counsel, on 14 May 2004 and 24 May 2004, whilst he was under police detention (see encl 11 para 5), quite unlike the state of affairs in *Mohamad Ezam*. Furthermore, the applicant had the services of counsel for the length and duration of the eight days hearing before the AB. It just would not add up that the applicant was denied counsel. The alleged breach of the second limb of art 5(3) was not made out.

[44] Also it would not appear that the presence of police officers at meetings between applicant/counsel on 14 May 2004 and 24 May 2004 had violated the rights of the applicant. The proviso to s 4 of the EO 1969 provides that 'the Internal Security (Detained Persons) Rules 1960 shall apply to every place of detention and to all persons detained therein under (the EO 1969)'. Rule 81(5) of those 1960 Rules provides that 'a Superintendent or an officer, or in the case of a visit to a female, a wardress, shall together with an interpreter in any case where such officer does not understand the language spoken be in sight and hearing during the whole of any visit to a detained person, unless the Superintendent by an order in writing sees fit to dispense with any of the above requirements'. And r 81(5) shall apply, but of course, *mutadis muntadis* to the EO 1969. Sanctioned by law, the presence of police officers at meetings between detainee/counsel could not be cause for complaint.

[45] The above survey of the authorities would have indicated how the legal arguments stand. To capitulate, it is law that whether or not to detain is a matter of opinion and policy which can only be taken by the executive, that whether or not the facts on which the order of detention is based are sufficient is a matter to be decided solely by the Minister, that the subjective satisfaction of the Minister to detain a subject is not subject to judicial review, that so long as the Minister is satisfied after considering all the information available to him, it is not for the court to question how or why he became so satisfied, that the court will not inquire into the sufficiency of the allegations of fact, that the fairness of the Minister's decision is subjective and the court is only concerned with the procedural aspects of the exercise of executive discretion, that courts do not sit in appeal against the decision of the Minister regarding the material on which the detention order was made, that courts do not examine the adequacy or truth of these materials and cannot interfere with the decision on the ground that if the court had examined them it would have come to a different conclusion, that the court cannot arrogate to itself the responsibility of judging the sufficiency or otherwise of the grounds, and that 'there shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power ... save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision'. It would pan out, that there cannot be, and so will not be, a judicial review of the ID allegations of fact and the so-called main allegation that the applicant was the leader of Gang 21. The jurisdiction to review is only in regard to any question of non-compliance with any procedural requirement. It should follow that likewise the jurisdiction to review, in relation to the AB hearing, must also be in regard to only any question of non-compliance with the procedural requirements under s 6, which is identical to s 10 of the Dangerous Drugs Act 1952, and to s 12 of the ISA. On the procedural requirements of s 10 of the ISA, Abdul Hamid Mohamad JC, as he then was, in *Teh Hock Seng v Minister of Home Affairs & Anor* [1990] 3 MLJ 191, enunciated:

> Section 11C(1) of the Act provides: There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agung or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> The relevant provision of the Act in this respect is s 10. As far as I can see there are only two procedural requirements provided by s 10. They are:
>
> (1) when representations are received, the Advisory Board is required to consider the representations within three months or such longer period as the Yang di-Pertuan Agung may allow;
>
> (2) the Advisory Board is required to make recommendations to the Yang di-Pertuan Agung.

These were complied with.

Subsection (2) provides for the Yang di-Pertuan Agung to give directions to the minister, if any, as he thinks fit. The section, or for that matter the Act, does not lay down any procedural requirement as to how or when the direction is to or should made. Therefore the question of non-compliance does not arise. In other words, considering the clear words of s 11C(1) it is, in my view, not a procedural requirement in the Act that the direction, if given, must be given within a reasonable time. On that ground alone the application fails.

[46] In the instant case, it was not contended that those procedural requirements of s 6 were not complied. Instead, it was argued: (1) that the AB hearing was not fairly conducted to the extent that the *audi alterum partum* rule was not complied; (2) that s 5(2)(b) contemplates particulars to be furnished to facilitate the representation; (3) that particulars vital for an intelligent defence were not given; (4) that the AB should not have refused the application for particulars; (5) that the material in the possession of the AB should also be in the possession of the applicant, or else the right to make representation is illusionary; (6) that the failure to provide particulars was a failure in the procedure during the AB hearing; (7) that the recommendation of the AB (counsel surmised that it would have been against the applicant) was perverse and unreasonable; (8) that the applicant was denied an effective representation and therefore there had been no representation; (9) that the AB should disclose its recommendation and supporting grounds; and (10) that the court could scrutinise the AB hearing for fairness. To all those arguments, counsel contended that s 7C is unconstitutional. But s 7C is undoubtedly constitutional, by reason of art 149 and or art 150. That has been said over and over again by the court (see authorities cited herein). And as for the argument that the AB hearing was not fairly conducted, that the recommendation of the AB was perverse and unreasonable, that the AB should disclose its recommendation and supporting grounds, that the court could scrutinise the AB hearing for fairness, the short answer is that 'the detention order of the Minister ... may only be challenged on ground of non-compliance with any procedural requirement, and nothing else' (*Lee Kew Sang* per Abdul Hamid Mohamad FCJ). There is no jurisdiction to review the proceedings before the AB beyond questions in regard to non-compliance with procedural requirements. As such, all invitation, be it direct or indirect, to review the proceedings conducted by the AB or to sit in judgment of the AB or its recommendation, must be declined. Suffice it to say that s 6 had been complied.

[47] However, it was legitimate to say that there is a right to particulars. Itwas held by Suffian LP in *Karam Singh* at p 151, that 'if a detainee honestly feels handicapped by the vagueness, insufficiency or irrelevancy of the allegations of fact on which the detention order is based, he has clearly recourse under s11(2)(b)(iii) (which is identical to s 5(2)(b)(iii) of the EO 1969, and to s9(2)(b)(iii) of the DDA) of the (ISA) to additional particulars'. But as was

pointed out by Edgar Joseph Jr J in *Athappen a/l Arumugam* at p 71, a detainee is only entitled to such particulars 'as he may, in the opinion of the Minister, reasonably require in order to make his representations against the order to the Advisory Board'. NH Chan JCA in Gurcharan Singh at p 9, put it crisply as follows:

> Section 11(1) requires a copy of the detention order made by the minister under s8(1) to be served on a detainee and it also entitles the detainee to make representations against the detention order to an advisory board. And, so as to enable the detainee to make his representations against the order to the advisory board, the detainee must, at the time when he was served with a copy of the detention order, be informed of his right to make such representations (s 11(2)(a)). At the same time he must also be furnished by the minister with a statement in writing of the grounds on which the order was made (s 11(2)(b)(i)), the allegations of fact on which the order was based (s 11(2)(b)(ii)), *and any other particulars that the minister might-wish to let him have (s 11(2)(b)(iii)*. (Emphasis added.)

[48] There is no automatic right to particulars as and when demanded. Theright to particulars is subordinate to the opinion of the Minister. Under s 5(2)(b)(iii), the Minister has the right not to furnish particulars, if such particulars are in the opinion of the Minister not reasonably required in order to make the representation to the AB. In the instant case, the grounds on which the order was made and the allegations of fact, were both furnished. The particulars were disclosed in the allegations of fact. And those particulars in the allegations of fact would have been the particulars that the Minister in his opinion considered that the applicant might require in order to make his representation. Furthermore, under r 10(2)(c) of the Public Order and Prevention of Crime (Procedure) Rules 1972, the AB has the discretion to determine 'whether any document or other information should or should not be made available or disclosed to a detained person and his advocate, or either of them'. The applicant could not demand particulars from the AB. On account of s 7C, there is no jurisdiction to review the opinion of the Minister under s5(2)(b)(iii) and or the discretion of the AB under the aforesaid r 10(2)(c). There was compliance with s 5. The Minister could not have been ordered by the AB to furnish particulars, as s 11 of the EO 1969 provides that 'nothing in the Ordinance or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or produce documents which he considers it to be against national interest to disclose or produce', which provision applies to proceedings before the AB (see *Mohamad Ezam* at p 499; see also *Theresa Lim* at p 297, where it was held by Salleh Abbas LP that s 16 of the ISA and art 151 cl (3) clearly authorise the executive not to disclose any information relating to national security, and that the matter whether it is really in the interest of security that such information be withheld, in view of s 16 and art 151(3), could not be decided by the court). In any case, only sufficient particulars need to be furnished (see Basu's *Commentary on the Constitution of India* (5th Ed, Vol 2) p 104, as quoted in *Aminah* at p 92;

see also *Mohamad Ezam* at p 478). And given that the said allegations of fact were on the face of it sated with particulars, it should seem not, not even vaguely so, that insufficient particulars were furnished. Rather, it would reasonably appear that the particulars in the allegations of facts would have been sufficient to enable the applicant to make his representation, to put his case or his side of the story so to speak, to the AB. On its part, the AB had the duty to consider the representation and make recommendations thereon to the Yang di-Pertuan Agong. That was done, and done within prescribed time. As said, the AB had discharged its statutory duty under s 6 in accordance with procedural requirements. The AB had satisfied all procedural requirements. Given so, there was nothing more that the applicant could demand of the AB. The applicant could seek a review under s 7 from the AB, but not a reversal of the recommendation from the court. Right or wrong, the recommendation itself is beyond judicial examination.

[49] The final challenge in relation to the allegations of fact was that the Minister had not signed on the document containing the allegations of fact and that therefore there was no proof of the subjective satisfaction of the Minister. The line of reasoning would be that since the Minister had not put his signature on the document he had not seen the contents of the document. Unfortunately, that line of reasoning, while not without logic under different facts, could not be sustained in the face of the evidence of the Minister. It was the firm averment of the Minister (see encl 10 para 7, and encl 18 para 6) that he had considered the reports and documents on the applicant, had applied his mind, and was satisfied that the applicant was the leader of Gang 21 and whose detention was necessary for the suppression of violence or crimes involving violence. Given those specific averments by the Minister, it would simply fly in the face of the evidence and logic if it were to be held that there was no evidence of the personal satisfaction of the Minister. There was evidence on the personal satisfaction of the Minister.

[50] Dato' Muhammad Shafee contended that detention was *mala fide*. Inrelation to *mala fide* as a ground for the grant of *habeas corpus*, it should now be taken heed of that it was held by the Federal Court in *Lee Kew Sang* that the 1989 amendments have 'limited the ground to only one ie non-compliance with procedural requirements'. It was not directly said, but it was more than clearly implied that mala fide could no longer be a ground for the grant of *habeas corpus* after 24 August 1989. Still it has to be said that it is not settled that *mala fide* could no longer be a ground. Hitherto, in *Mohamad Ezam*, a five judge panel of the Federal Court had readily considered the issue of *mala fide* in favour of the detenu. In the face of conflicting authorities, it should seem the safer course to consider the issue of *mala fide*.

[51] So, what amounts to a detention order that is *mala fide*? On that, Mohamed Dzaiddin CJ in *Mohamad Ezam* at p 469 turned to two authorities.

I need to rely only on two authorities.

(1) Basu's *Commentary on the Constitution of India* (15th Ed, Vol 2) at p 153 states:

> An order of detention is *mala fide* if it is made for a 'collateral' or 'ulterior' purpose, ie a purpose other than what the legislature had in view in passing the law of preventive detention (ie prevention of acts prejudicial to the security of the State, maintenance of public order and so on). There is a *mala fide* exercise of the power if the grounds upon which the order is based are not proper or relevant grounds which would justify detention under the provisions of the law itself, or when it appears that the authority making the order did not apply his mind to it at all, or made it for a purpose other than that mentioned in the detention order. The question of *mala fides* has to be decided with reference to the facts of each case and the observations in one case cannot be regarded as a precedent in dealing with other cases. The onus of proving mala fides is upon the detenu, and the trend of recent decisions shows that it is not likely that the detenu may succeed in many cases.

(2) In *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs Malaysia & Ors* [1975] 2 MLJ 279 it was held, *inter alia*, that (1) the onus of proving *mala fide* on the part of the detaining authority is on the applicant and is normally extremely difficult to discharge as what is required is proof of improper or bad motive in order to invalidate the detention or order for *mala fide* and not mere suspicions; and (2) where an order of detention is challenged on the ground of *mala fide*, what has got to be made out is not the want of *bona fide* on the part of the police, but the want of *bona fide* as well as the non-application of mind on the part of the detaining authority which for this purpose must be taken to be different from the police.

[52] At 470, Mohamed Dzaiddin CJ imparted the following observation:

> *Mala fide* does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, ie for a purpose other than the purpose for which it is professed to have been exercised per Pen Swee Chin J (as he then was) in *Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 MLJ 468 at p 473. It is in this context that I am satisfied that the appellants have discharged the burden of proving mala fide on the part of the respondent. In my judgment, the appellants have succeeded in showing that the respondent had acted *mala fide* in their arrest and detention under s 73 of the ISA.

[53] It was contended, but was it made out that detention was *mala fide* on account of the following and or combination of the following: (i) section 3(1) was not first satisfied and that the police had built up its entire case during the 60 days detention, (ii) the allegations were without factual foundation, (iii) the applicant was denied counsel, (iv) the interrogation of the applicant on his relationship with the former IGP, showed a collateral purpose, to wit, the personal vendetta of certain police officers (v) Sergeant Murthi disturbed the

defence during the hearing before the AB, (vi) the investigation was cavalier in manner, (vii) the Act was misused, (viii) witnesses suddenly appeared whilst the applicant was under police detention, (ix) fabrication of the case against the applicant, the classic instance being the 6th allegation, where the alleged witness denied and or retracted his alleged statement, (x) the discharge of firearm only warranted forfeiture of the firearm but not preventive detention, (xi) if the Minister were aware that the firearm was licensed, the decision under s 4 could have been different. In relation to those points or arguments, (i) to (iii) have been answered against the applicant. In relation to (iv) to (xi), let it be repeated that the court cannot inquire into the sufficiency of the allegations of fact. Hence, it was idle to allege that the investigation was cavalier, that witnesses suddenly appeared, that the allegations lacked evidential foundation, that the discharge of firearm only warranted forfeiture of the firearm, and or that the case was fabricated, which were issues and or matters that belonged to the Minister. At any rate, it was not made out that the investigation was cavalier. It was not shown that the sudden appearance of witnesses during the 60 days police detention was anything irregular. After all, during the 60 days police detention, investigation would not come to a halt (see *Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 3 MLJ 691, at p 694). Besides, witnesses could come out from the closet. As for the complaint that Sergeant Murthi took photographs of the applicant's witnesses at the canteen, it was duly dealt with by the AB, and there it should end. Oneswallow does not make a summer. One fact does not make up any case. The applicant might have been interrogated on his relationship with the former IGP, but it does not follow that detention was therefore for a collateral purpose, or that there was a personal vendetta. Wong might have retracted his statement, but it does not follow that allegation 6 and other allegations were therefore fabricated. If truth be told, allegation 4 was admitted, and that put paid to the contention that the case was entirely fabricated. Granted, other allegations were denied, but denials could not be the basis for to find that the case was fabricated.

[54] There was no defect in the procedure adopted by the detaining authority. And it was not shown that there was any collateral or ulterior purpose on the part of the detaining authority. Rather, it was shown that the arresting officer had 'reason to believe', and that his 'reason to believe' was with objective basis, as the arresting officer had information that the applicant 'merupakan seorang ahli kumpulan haram/kongsi gelap yang telah terlibat di dalam kegiatan-kegiatan yang mengancam ketenteraman awam dan kesalahan-salahan jenayah yang bercorak kekerasan' (see encl 20 para 4), which activities included 'ugutan dan penggunaan kekerasan, penggunaan senjata api secara salah dan merancang pembunuhan' (see encl 20 paras 11 & 12), and which activities were all within the scope of the kind of criminal activity that could be suppressed by an order of detention under s 4(l) the EO 1969, should the Minister deem it necessary to make that order. It was also shown that all allegations of fact relate either

to acts prejudicial to public order, or to acts involving violence, in either case to acts within the scope of the EO 1969. All that pointed to the *bona fide* use of the EO 1969. On the contrary, it was not admitted in encl 20 para 13 that it was only upon interrogation that it was established that the applicant was the leader of Gang 21. Rather, it was said by Acting DSP Samat that the interrogation confirmed 'telah mengenal pasti' that the applicant was the leader of Gang 21. On the other hand, it was not shown that there was any misuse of the EO 1969. The applicant offered denials and proposed that preventive detention must be based on evidence as good as that for a conviction by a court, but is resorted to for reasons of security. With respect, that latter proposition could not be further from the truth. In preventive detention, the evidence of allegations may not be strictly admissible and may not be sufficient to secure a conviction in a court of law, but on account of the needs and exigencies of the administration the law deems such evidence sufficient for the subjective decision of the Minister (see the dissenting judgment of Lee Hun Hoe CJ (Borneo) in *Superintendent of Pulau Jerelak & Anor v Wong Cheng Ho* [1980] 1 MLJ 154, at p 158). 'The question is one of preventive detention justified by reasonable probability, not of criminal conviction which can only be justified by legal evidence' *Liversidae v Sir John Anderson & Anor* [1942] AC 206, at p 254, per Lord Macmillan).

[55] There were other propositions on the state of the law or authorities that also failed to impress. It was so put forth, but *Mok Han Liang or Sukumar a/l Subramniam* or *Ram Bahadur Rai* were not precedents on the grant of *habeas carpus* on account of vagueness in the allegations of facts. It was not appreciated that *habeas corpus* was granted in all three cases on account of the vagueness in the grounds. It was so put forth, but *Khawaja* is not any authority on either 'subjective satisfaction' or 'judicial review', as understood in Malaysia. And it was most astonishingly put forth that the validity of the detention order of the Minister is not affected by any non-compliance with the procedural requirements of s 3 and that all questions in regard to non-compliance with s 3 could not be raised. Dato' Mohd. Yusof found supposed support for his proposition in *Ooi Ah Phua* at p 201 para I, PE Long at 135 para G, *Re Ohkar Shrian* at p 30, *Koh Yoke Koon* at 302 para I onwards, and in *Nasharuddin* at p 100. But all examination of those authorities revealed no such support. In *Ooi Ah Phua*, itwas held that by the time the application was heard 'Ooi had been detained by order of a magistrate, and so there was no question of his detention being unlawful'. Ooi was under legal detention and not preventive detention, and *Ooi Ah Phua* has no relevance to the proposition. In *PE Long*, Arulanandom J undoubtedly said that the 'complaint about the arrest would appear to be academic and of no relevance to an application for a writ of *habeas corpus* against the detention by the applicants by order of the Minister for Home Affairs', but his Lordship said so only after he had held that there was nothing 'irregular or illegal in the arrest ... and there has therefore been no violation of the provisions of the Federal Constitution or the EO 1969', and it was in

that context that his Lordship opined that the arrest would appear to be academic. In *Re Ohkar Shrian*, it was held by Choor Singh J that a person who is not detained in custody is not entitled to a writ of *habeas corpus*. That ratio would not advance the proposition. At 100 of *Nasharuddin*, Steve Shim CJ never said that the order of the Minister would not be tainted by the illegality or irregularity in the police detention. In *Koh Yoke Koon*, Edgar Joseph Jr J held that 'the detention order will not operate to salvage the case for the detaining authority for it specifically provided for detention at the centre for two years from 12 December 1986 and cannot therefore have the effect of rendering legal the applicant's illegal detention at the Muar police station from 14 December 1986 until his removal therefrom on the morning of 16 December 1986', and granted *habeas corpus*. That ratio would not advance the proposition. If at all, *Koh Yoke Koon* said that the detention order of the Minister was invalidated by the failure of the police to comply with procedural requirements. In point of fact, there is only one scheme of detention (see *Theresa Lim* at p 296, where it was held by the Federal Court per Salleh Abbas LP, 'that arrest and detention by the police and detention pursuant to a ministerial order or further detention after the matter has been considered by the Advisory Board' are to be regarded 'as one continuous process beginning with the initial arrest and detention under s 73'), and as one continuous process, the detention order of the Minister could be struck down for any failure to comply with any procedural requirement, be it by the police, AB or Minister. There is no merit in the proposition that the detention order of the Minister stands on its own (see *Chong Yung Yao v Menteri Keselamatan Dalam Negeri Malaysia & Ors* [2005] 5 CLJ 461, where the court flatly rejected the argument that any failure to comply with the procedural requirements under s 73 of the ISA or comparable provision would not taint the order of the Minister and or that the court should disregard all allegations of failure to comply with s 73 of the ISA or comparable provision).

[56] There is a matter of public policy that was not raised. Section 10 of the EO 1969 provides that 'every member of an Advisory Board shall be deemed to be a public servant within the meaning of the Penal Code in force in that part of Malaysia in which he exercises the functions of a member of an Advisory Board, and shall have in case of any action or suit brought against him for any act done or omitted to be done in the execution of his duty under the provisions of this Ordinance the like protection and privileges as are by law given to a judge in the execution of his office'. Section 14 of the Courts of Judicature Act 1964 provides that 'no judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time, in good faith believed himself to have jurisdiction to do or order the act complained of'. Together, those two provisions provide that no member of the Advisory Board shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his

advisory board duty. Now, whatever complained of against the AB were acts done or ordered to be done by the AB in the discharge of its duty. Accordingly, the AB and its members of the AB were not liable to suit and could not be sued for the acts complained of against them. 'The purpose of the principle is not, of course, to protect the personal interests of judges, but rather to protect the public interest in an independent and impartial justice system. To this end, judges, in performing their judicial functions, must be able to do so without fear of personal liability for what they say or do in their judicial capacities. Anyerrors they make may be corrected on appeal (or judicial review, as the case may be), but they should not have to fear that they may be threatened by dissatisfied litigants, or others, with civil actions charging them with malice, bias, or excess of jurisdiction. A judge should not be subject to the influence of personal concerns, conscious or unconscious, when performing his judicial functions' (Rover v Mignault (1988) 50 DLR (4th) (Que CA) per Rothman JA, as quoted in *Prefontaine v Gosman* 9903–11629 Alta QB 2000 Alta DJ 206; 2000 Alta DJ LEXIS 257, 21 March 2000). 'The reason for the rule, according to Compton J in an 1867 case, was 'to secure the independence of the judges, and prevent their being harassed by vexatious actions'. (*Fray v Balckburn* (1863) 3 B & S 576 at p 578; 122 ER 217]. The judge 'should not have to turn the pages of his books,' Denning stated, 'with trembling fingers, asking himself: 'If I do this, shall I be liable in damages' (*Sirros v Moore* [1975] 1 QB 118 at p 136' (Friedland, *A Place Apart; Judicial Independence and Accountability in Canada* (1995) p 34, as quoted in *Edwards et al v Law Society of Upper Canada* 37 OR (3d) 279). 'If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment', it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?" (*Sirros v Moore* [1975] 1 QB 118 per Lord Denning MR). 'Independence of the judiciary has normally been thought of as freedom from interference by the executive or legislature in the exercise of the judicial function. This, for example, was the conception expressed by the International Congress of Jurists at New Delhi in 1959 and arises from the fact that historically the independence of the judiciary was endangered by parliaments and monarchs. In modern times, with the steady growth of the corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured. In short, independence of the judiciary implies not only that a judge should be free from governmental and political pressure and political entanglement but also that he should be removed from financial or business entanglements likely to affect, or rather to seem to affect, him in the exercise of his judicial functions' (S Shetreet, *Judges on Trial* (1976), at pp 17–18, as quoted in *Lippe et autres v Quebec (Procureur general) et autres* 39 QAC 241). 'The protection of personal independence is not confined to the concern over potential pressures on judges

as a result of undue executive control. Personal independence is also protected against potential pressures from the parties to the case. This is the rationale behind the doctrine of judicial immunity which shields the judge against actions for words, acts, or omissions in the discharge of his judicial function' (Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, op cit, at p 623, as quoted in *Lippe et autres v. Quebec (Procureur general) et autres*. Even so, the applicant had cited and brought the AB and or its members to court as defendants. It is the considered opinion of this court that things must be put right. And the only way to do so is to strike out the AB and or its members as defendant/s, which is now so ordered. As for the application itself, it is hereby dismissed for the above reasons.

Application for habeas corpus dismissed.

Reported by Peter Ling

A B C D E F G H I